SENIOR COURTS
COSTS OFFICE

SCCO Ref: 36/17

Dated: 17 August 2017

**ON APPEAL FROM REDETERMINATION**

**REGINA v MCCARTHY**

ISLEWORTH CROWN COURT

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

CASE NO: T20167057

LEGAL AID AGENCY CASE

DATE OF REASONS: 25 January 2017

DATE OF NOTICE OF APPEAL: Undated

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| APPLICANT: IBB 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 £100 paid on appeal, should accordingly be made to the Applicant.

**COLUM LEONARD**

**COSTS JUDGE**

## REASONS FOR DECISION

1. This appeal concerns (a) a claim by defence solicitors for payment, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013, for working on evidence received from the prosecution and (b) a claim for a cracked trial fee on the basis that the Appellant's client, Gracie McCarthy ("the Defendant") was the subject of two indictments, for each of which, under the Litigators' Graduated Fee Scheme set out in Schedule 2 to the 2013 Regulations, a separate fee is payable. The relevant Representation Order was made on 25 February 2015.

2. Payment is claimed for 7,999 pages of Pages of Prosecution Evidence (" PPE"). Payment for 6,314 pages has been allowed by the Determining Officer. The Determining Officer has also decided that the Appellant is entitled to the appropriate fee for one case that went to trial. The Appellant claims payment for two separate cases. For one of them, says the Appellant, a trial fee is payable and for the other a cracked trial fee is payable.

**The Regulations: PPE**

3. Payment for working on evidence served by the prosecution, in accordance with the 2013 regulations, is made by reference to the number of PPE, subject to an overall limit of 10,000 pages. No such payment is made for working on "unused material", which is relevant or potentially relevant material delivered by the prosecution in accordance with its statutory obligations of disclosure, but not served as prosecution evidence. That work is covered by the basic graduated fee.

4. Paragraph 1(2) of Schedule 2 to the 2013 Regulations explains how, for payment under the Litigators' Graduated Fee Scheme, the number of PPE is to be calculated:

> "…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."

**The Regulations: Cases and Cracked Trials**

5. A "case" is defined in Schedule 2 to the 2013 regulations, at paragraph 1(1), in this way:

"…proceedings in the Crown Court against any one assisted person—

(a) on one or more counts of a single indictment;

(b) arising out of a single notice of appeal against conviction or sentence, or a single committal for sentence, whether on one or more charges; or

(c) arising out of a single alleged breach of an order of the Crown Court,

and a case falling within paragraph (c) must be treated as a separate case from the proceedings in which the order was made…"

6. A "cracked trial" is defined as

"…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 at hearing at which the assisted person entered a plea …"

## Background

7. The Appellant represented the Defendant in the Isleworth Crown Court in relation to charges concerning her involvement in a large-scale conspiracy to commit burglary. The Crown sought to prove that the defendants, who (the Defendant aside) were closely linked family members, were between September and December 2014 running a full-time criminal enterprise during which some carried out burglaries of residential premises and others provided support. They operated in West London and targeted the homes of Asian families in particular. When they could find car keys inside a house and the car outside, they stole the car.

8. It was alleged that the conspiracy was organised by Johnnie Flynn following his release from prison, having just served a 4½ year sentence for an identical pattern of offending. The Defendant was Flynn's girlfriend at the relevant time. It was the Crown's case that the Defendant was very closely associated with one burglary; that she was closely associated with other conspirators; that she was closely associated with various "stash houses" in which stolen goods were kept, two addresses in particular; and that she was, as an important part of the support network, closely associated with stolen property from a number of burglaries.

9. The evidence against the Defendant primarily consisted of cell site evidence placing her at or near to the locations of various burglaries; CCTV evidence showing her unloading stolen property at one of the two properties used to store it; and fingerprint evidence connecting her to stolen items stored at both.

## The Indictment

10. According to the court log and the papers filed in support of the appeal, the Defendant was, on 27 May 2015, arraigned on an indictment containing, as against the Defendant jointly with others, three counts. This had been sent to the Appellant under cover of a letter dated 18 May 2015. Count 1 was of Conspiracy to Commit Burglary; count 2 was of Conspiracy to Steal; and count 3 was of Conspiracy to Acquire, Use and Possess Criminal Property.

11. The court log for 27 May 2015 indicates that as against the Defendant, count 2 on the indictment (Conspiracy to Steal) was ordered to remain on file. On the evidence, that would appear to be incorrect. The Appellant has supplied me with a contemporaneous attendance note from counsel which indicates that count 2 was ordered to lie on file only in relation to other defendants who had

pleaded guilty to count 1 (Conspiracy to Commit Burglary). The Defendant, in fact, pleaded not guilty to all three counts against her.

12. This, I think, must be right: a later entry for 30 June 2015 records a not guilty plea by the Defendant against counts 1, 2 and 3 on what is described, from 25 June 2015 onwards, as "indictment 1" (though I have found no reference on the court log to an "indictment 2"). Other court log entries, to which I refer below, also seem to confirm the accuracy of counsel's note.

13. On 9 November 2015 the CPS sent to the Appellant a letter enclosing "a 3 count indictment for the jury in the above trial" (the trial date given being 13 November). The enclosed indictment contained, as against the Defendant (and others) one count of Conspiracy to Commit Burglary (count 1) and one of Conspiracy to Acquire, Use and Possess Criminal Property (count 2). Count 3, against one Dane Flynn only, was of Handling Stolen Goods.

14. In short, the indictment served on 9 November 2015 made no mention of Conspiracy to Steal, which had been count 2 in May 2015. It had been replaced as count 2 by Conspiracy to Acquire, Use and Possess Criminal Property, formerly count 3.

15. The court log for 13 November confirms a trial date of 30 November 2015 for the Defendant. The log for the first day of trial, 30 November, records that no evidence was offered on count 2 against those who had pleaded guilty (presumably to count 1) on 27 May. It then records a request by the Crown to sever count 2 and count 3, to be dealt with at the conclusion of the trial. There is, as elsewhere on the court log, a lack of clarity here because it also records an indication by the Crown to proceed on a 2-count indictment (counts 1 and 3). However it records unequivocally that, counsel for the relevant Defendants having confirmed no objection, count 2 and count 3 were both severed to be dealt with at the end of the trial. Judging by subsequent entries, that would seem to be correct.

16. On the fourth day of trial, 3 December 2015, counsel for the Defendant indicated to the court that the Defendant would plead to a new count. Accordingly, a new count of Becoming Concerned in an Arrangement, contrary to section 328 of the Proceeds of Crime Act 2002, was added to the indictment against the Defendant. This was initially referred to as count 8, but it seems was added to the indictment as count 3 in place of the original count 3 against Dane Flynn, severed from the indictment on 30 November. Confusingly, the new count seems to be referred to in the court log, variously, as count 3 and count 8.

17. The court log records a direction to the jury, on 3 December, to render a guilty verdict on the new count 3 against the Defendant, but also a plea of guilty on 18 April 2016 to "count 8 on indictment 1… Arraigned on 3 December 2015". As I have observed, this is confusing, but it would seem that both references are to the new count against the Defendant, the only offence to which she pleaded guilty and the only offence for which she was sentenced (a record of sentencing on 29 April 2016 refers to sentencing on "count 8 only"). The log

then records an order that counts 1, 2, and 3 on "indictment 1" are to remain on file, along with details of sentencing on "count 8 on indictment 1".

**The Claim for a Cracked Trial Fee**

18. The case as first put by the Appellant was that the indictment of May 2015 was indictment 1. It was not proceeded with, nor dealt with by any order. It was replaced in November 2015 by indictment 2, for which a trial fee is due (and has been paid), Accordingly, it was said, a cracked trial fee is due for an indictment that did not proceed to trial.

19. The Appellant argued that there is a very real distinction between the two indictments. The first contained a count of conspiracy to steal, which was the Appellant submitted very significant because the conspiracy referred to was a conspiracy to steal cars. That linked directly to the count of conspiracy to burgle because the Defendant's DNA was found inside stolen vehicles linked to the burglaries the subject of count 1.

20. By leaving the "conspiracy to steal" count out of indictment 2, says the Appellant, the Crown's ability to link to burglaries the cars in which the Defendant's DNA was found, diminished greatly. In fact the nature of the case completely changed: two different cases had to be prepared by the Appellant. The Appellant also points to the inclusion of different co-defendants in each of the two indictments as an indication that they are distinct and separate indictment.

21. The Determining Officer concluded that the original indictment was not quashed, nor replaced by a new indictment. In his view the case against the Defendant started with a 3-count indictment to which additional counts were added. Her conclusion was, accordingly, that there was one indictment throughout the case and that only one fee is payable.

22. Mr Rimer, for the LAA, suggested that that the original count 2 was, as the court log for 27 May 2015 indicates, ordered to lie on file. That interpretation of events, he says, is consistent with the November 2015 version of the indictment which omits the "conspiracy to steal" count and it represents nothing more than an amendment to the original indictment.

23. As I have observed, the court log would seem to be incorrect in recording that the original count 2, the "conspiracy to steal" count, was on 27 May 2015 ordered to remain on file. The true position would seem to be that the Defendant pleaded not guilty to all 3 counts on the indictment as it stood on the 27 May 2015. The omission of the "conspiracy to steal" count from the indictment as served on 9 November 2015 may well, as with the court log, have been an error.

24. Whether or not that is the case, the impression given by the available record is that, up to 3 December 2015, various counts and various defendants were added or subtracted.

25. As Mr Rimer submits, that does not in itself offer any basis for concluding that at some point, a new indictment came into existence. Nor, in my view, is the apparent change of emphasis in the case against the Defendant between May and November 2015, and the amount of work that had to be done as a result, to the point. As in *R v Hussain* [2011] 4 Costs LR 689, the question is not whether the litigator or advocate has earned payment for one or for two indictments but whether, under the 2013 Regulations, two fees are payable.

26. Having however received a copy of the court log from Mr Rimer in the hearing before me, Mr Ilyas for the Appellant made a new and different point. The court log, as I have mentioned above, clearly records that on 3 December 2015, as against the Defendant, count 2 was severed from the original indictment, to be dealt with in at the conclusion of the trial, and was subsequently ordered to lie on the file. Following severance, count 2 did not proceed to trial. It follows, submitted Mr Ilyas, that by reference to paragraph 1(1) of the 2013 Regulations, a cracked trial fee is payable.

27. This seems to me to be correct. The LAA's published 2017 guidance (at 3.1, paragraph 2) puts the point in this way:

> "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".

28. On 27 May 2015 the Defendant had pleaded not guilty to the count of Conspiracy to Acquire, Use and Possess Criminal Property shown as count 3 on the original version of the indictment as served on 18 May 2015, and as count 2 on the indictment as served on 9 November 2015. Count 2 was then, on 3 December 2015, severed, creating a new "case", for the purposes of the Graduated Fee Scheme, as against the Defendant. On 16 April 2016 (the Defendant having pleaded guilty to new count 3) the severed count 2 was ordered to remain on file.

29. It follows that the Appellant is entitled to a cracked trial fee in respect of the severed count 2, to which the Defendant had, on 27 May 2015, pleaded not guilty; which was severed and then did not proceed to trial; and in in respect of which the Crown, before the Defendant pleaded not guilty, had not declared an intention of not proceeding.

30. As Master Gordon-Saker observed in *R v Hussain*:

> "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…"

31. For those reasons, this part of the appeal succeeds.

**The PPE Claim: Discs MMA/1-161214 and MMA/2-161214**

32. In the course of preparation of the Defendant's case, the Appellant received 18 discs containing electronic material. Only one of those discs was referred to in a Notice of Additional Evidence (NAE). The Appellant has claimed payment for the content of five of the discs as PPE.

33. On the 18 September 2015, the Appellant sent an email to the CPS referring to some 17 discs of electronic material which had been received by the Appellant without any indication of its status either as PPE or as unused material. The Appellant pointed out that none of the information on disc appeared to have been exhibited, and requested confirmation of the disc and exhibit numbers.

34. Two of the discs referred to did not play. Another four of them were blank. The blank discs included "MMA/1-161214 Samsung Johnnie Flynn" and "MMA/2-161214 Samsung Johnnie Flynn". Replacements were requested for the non-functional and the blank discs.

35. I have seen no record of any timely reply to that enquiry from the CPS, but on 6 November 2016 the Appellant received from the Metropolitan Police, "Further to your email…" a number of discs and exhibit references. The discs included MMA/1-161214 and MMA/2-161214, this time complete with the data which they were intended to contain.

36. The Appellant says that these two discs were pivotal to the Crown's case. In particular the documents contained on disc MMA/1-161214 contained messages from Flynn's phone addressed to the Defendant. The phone in question had been placed at the scene of at least one burglary, and data from it was incorporated into schedules produced by the Crown. MMA/2-161214 carried less weight from the Defendant's point of view, containing as it did communications between Flynn and another defendant, but it was, again, attributed to her boyfriend Flynn and linked to the burglaries.

37. The total PPE claim for discs MMA/1-161214 and MMA/2-161214 is 167 pages.

38. The Appellant also seeks payment for 5310 PPE served on disc CKW/1/111114, of which 3792 pages have been allowed. This disc contained a report prepared by the Crown extracted from telephone records, and the raw material from which the report was derived.

39. Whilst it is common ground that the content of disc CKW/1/111114 was served evidence, the Determining Officer found that there was substantial duplication in the evidence as served. (The Appellant states that this is a reference to duplication between the reports compiled by the Crown and the underlying source material). She also noted that on going through the material on disc, the Appellant had identified some of it as irrelevant.

40. Between them the content of discs MMA/1-161214 and MMA/2 (167 pages) and the 1518 pages disallowed in relation to disc CKW/1/111114, make up the

1685 PPE disallowed by the Determining Officer for which the Appellant, through this appeal, seeks payment.

**Authorities on PPE**

41. Two recent judgments, both on appeal from costs Judges, have a particular bearing upon the PPE part of this appeal.

42. The first is the decision of Mrs Justice Nicola Davies DBE in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB). In that case the Lord Chancellor appealed, unsuccessfully, against a decision of Master Rowley to the effect that the entirety of telephone download evidence, served in similar circumstances to this case, should be counted as PPE. A disc containing the complete data downloaded from two mobile phones had (for purely practical reasons) been handed by prosecuting counsel to defence counsel at court, and subsequently re-sent to defence counsel's chambers by courier. That had followed the defence's refusal to agree the admission into evidence of selected text messages and schedules derived from that evidence, without sight of the underlying source material. The source material itself had never been listed as an exhibit, served with a NAE or listed in a schedule of unused material.

43. In the absence of such markers, the court made its own determination of the evidential nature of the phone download data served by disc. Nicola Davies J noted that the text messages extracted from that data had been an important part of the Crown's case; that the defence had refused to agree to the admission of that extracted data until it was able to examine all of the downloaded data; that their examination satisfied the defendant's legal representatives of the veracity of the extracted data, and put it in context; that it enabled the defendant's legal team to extract any communications which they (as opposed to the prosecution) deemed to be relevant; and that the trial judge had entertained, and approved, an application for the full downloaded evidence to be served.

44. The learned judge concluded that notwithstanding that the Crown had not served a NAE, the entirety of the download served on disc was in fact additional evidence, served both on the defence and on the court. Accordingly it all fell within the definition of PPE for the purposes of the 2013 Regulations. Further, there was no duplication between the downloaded material itself and the reports extracted from it, because each new page of extracted data had to be considered and checked against an identified counterpart in the original download. This was not duplication, but additional work.

45. As to the fact that the evidence was served in electronic form, so falling within subparagraph (5) of paragraph 1 of Schedule 2 to the 2013 Regulations, the Lord Chancellor argued that there would be material on the disc that would not require much by way of examination and that legal aid funds should not be spent on such an examination, which if appropriate might be claimed as special preparation. Nicola Davies J said this (at paragraph 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."

46. The second decision to which I must refer in some detail is the judgment of Mr Justice Holroyde J in *The Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB).

47. In *Lord Chancellor v SVS* Holroyde J observed that the role of a defence lawyer is not confined to checking the accuracy of the summaries of the material which the prosecution has chosen to include. It often extends to also 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 often be necessary to review what has been omitted before being able to agree the accuracy of that which has been included.

48. Holroyde J rejected the proposition that the evidence and exhibits upon which the prosecution rely are the only documents that can ever be "served". He also observed that "served" evidence is not necessarily identical to the evidence and exhibits upon which the prosecution relies. The former may include material which is not realistically being "relied on" because, for example, it is an irrelevant part of a statement.

49. The learned judge formulated a number of useful guidelines for judging PPE claims They are set out at paragraph 50 of his judgement as follows:

    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" does no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. "Service on the court" is not 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 seeks to rely on only part of the data recovered from a particular source, and therefore serve an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues will depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.

viii) If – regrettably - the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial

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

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. 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.

**The LAA's Submissions on PPE**

50. Mr Rimer for the LAA submitted that as part of the police investigation, mobile phones were recovered from each of the defendants. The call data records for five phones were downloaded and analysed in detail and used to produce five combined call schedules served as exhibits. Various discs containing call data were served during the proceedings.

51. Mr Rimer observed that the Crown has confirmed that the content of four discs, pivotal to the case as it formed the basis of various call and cell site schedules prepared by the Crown, were exhibits. It is not disputed that that material is

capable of being included in the PPE. Much of it has been included in the 6,314 pages for which payment has already been made.

52. No comment has been offered by the Crown as to whether discs MMA/1/161214 and MMA/2/161214 had been served as evidence or were provided as unused material. The relevant material, Mr Rimer observed, appears to contain a download comprising various images and text messages from a telephone attributed to Johnnie Flynn. Although Mr Rimer accepted that the status of the material is ambiguous, the fact that the Crown has refused to confirm that the content of these particular discs were exhibits, as they did for four other discs offers, he suggests, a strong indication that the Crown did not consider their contents to be served as evidence.

53. Mr Rimer argues that no information has been put forward by the Appellant to demonstrate that the material contained on discs MMA/1/161214 and MMA/2/161215 was pivotal to the Crown's case. The prosecution documents provided in the appeal papers, such as the case summary, do not indicate that telephone evidence, aside from cell site data, was a pivotal part of the case against the Defendant. The call data and cell site data underpinning the schedules were served separately on disc and have been allowed as PPE. The extent to which the Crown would have sought to rely on the additional data on discs MMA/1/161214 and MMA/2/161215 is, he submits, unclear on the evidence provided by the Appellant.

54. Mr Rimer submits that paragraph 50(viii) of *Lord Chancellor v SVS* confirms that where a Determining Officer is unable to conclude whether material was in fact served, it must be treated as unused material, even if it was important to the defence. On the information provided by the Appellant, a Determining Officer or Costs Judge could not be satisfied that discs MMA/1/161214 and MMA/2/161215 had been served as evidence. The Determining Officer was therefore entitled to conclude that it was unused material.

55. In the alternative, and on the basis that discs MMA/1/161214 and MMA/2/161215 were in fact served as evidence in the case, Mr Rimer argues that, given that the material did not relate directly to Ms McCarthy and that the key evidence underpinning the Crown's schedules has already been paid as PPE, it would be more appropriate to remunerate any time spent considering these 167 pages under the special preparation provisions rather than to treat them as PPE.

56. As for disc CKW/1/111114, 3,792 pages have already been paid as PPE from this disc. The material that has been allowed, says Mr Rimer, comprised:

- Sim Report - 5 pages
- Exhibit Photos – 34 pages
- Apple Device Report (excel) – 3,392 pages
- Apple Device Report (PDF) - 362 pages

57. 1,517 pages were he says excluded from the PPE calculation by the Determining Officer. The material that was disallowed comprises:

- Device Images – 739 pages
- BBM Chats – 2 pages
- I messages – 21 pages
- Whatsapp messages 14 pages
- Thumbnail images – 739 pages (duplicate of Device Images)

58. The Determining Officer did not exercise her discretion to allow these images and messages as PPE, because many of them were duplicated in the Crown's report. In any case, as the Appellant has conceded, many of the text chats were not relevant to the case against the Defendant.

59. Very limited information, he submits, has been put forward by the Appellant to demonstrate how the disallowed evidence on this disc was pivotal the prosecution case. The case against the Defendant consisted primarily of cell site data, CCTV evidence and fingerprint evidence. It is therefore unclear to what extent the information on the phones was pivotal or why a detailed analysis would be required. Little mention of the phones was made in the prosecution opening. While the Appellant may have needed briefly to have looked at the images or messages, the Respondent submits that if it is to be counted as served, this material would be more appropriately paid under the special preparation rules.

**Conclusions**

60. Mr Rimer's submissions alter the words at paragraph 50 (viii) of Holroyde J's judgment in *Lord Chancellor v SVS*:

> "…If the Determining Officer (or Costs Judge) is unable to conclude *that*…" (my emphasis) "…material was in fact served, then it must be treated as unused material…",

to

> "…If the Determining Officer (or Costs Judge) is unable to conclude *whether*… material was in fact served, then it must be treated as unused material".

61. In doing so he seems to me to attempt to change the meaning of that paragraph so as to suggest that, if there is any doubt about whether material was served as PPE, that doubt must be resolved by concluding that it was not. That is not what the learned judge said: quite the contrary. It is a matter of making a finding on the facts.

62. I am unable to accept that the fact that the CPS has not commented upon the status of the material on discs MMA/1/161214 and MMA/2/161215 leads to the conclusion that it should be treated as unused material. It does not lead, in my view, to any conclusion other than that the Crown seems to be unable to assist as it should. The evidence I have seen indicates that the reason for that is that service by the Crown of material on disc, in this particular case, was notably disorganised. Even after the event, in the course of the Appellant's claim for

payment, attempts to clarify the position were hampered by the Crown's difficulty in finding relevant records.

63. It seems to me that, bearing in mind the criteria set out in both *Lord Chancellor v Edward Hayes LLP* and *Lord Chancellor v SVS*, the claim for payment for PPE in respect of disc MMA/1/161214 is fully justified. It was, in my view, material of central importance to the case against the Defendant. I take a different view in relation to the material on disc MMA/2/161215, which I conclude should be treated as served material but which being of less significance should be remunerated by way of a special preparation claim, as Mr Reimer suggests in the alternative to his primary case. I do not, I believe, have details of the PPE count for each disc, but the parties should be able to resolve that without difficulty.

64. As for disc CKW/1/111114, it is common ground that most of the material on that disc should be treated as PPE. As for the unpaid balance, in my view the disallowance of any of the served material on the basis that it duplicates copies included in the Crown's report runs directly contrary to the guidance given by Mrs Justice Nicola Davies DBE in *Lord Chancellor v Edward Hayes LLP*. It was incumbent upon the Appellant to check the contents of the report against the data from which it was derived: that was not duplication but additional work.

65. The disallowance of other pages from the PPE count on the basis that the Appellant, in undertaking that checking exercise, identified some of the material as irrelevant (or on the basis, if such is the case, that it otherwise incorporated an element of duplication) also seems to me to be contrary to her findings, quoted above, on the importance of considering the material in context.

66. Holroyde J, in *Lord Chancellor v SVS*, made a similar point (at paragraph 47 of his judgement):

> "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..”

67. Bearing in mind the guidance of both Nicola Davies J and Holroyde J, it seems to me that something more is needed to exclude served evidence from the PPE count than a broad finding to the effect that some of it proved to be irrelevant or duplicative.

68. In my view, on the facts of this case, the entire content of disc CKW/1/111114 should be included in the PPE count.

**Summary of Conclusions**

69. For the reasons I have given I have concluded that the Appellant is entitled to be paid a further cracked trial fee in respect of count 2 of the indictment as it stood in November 2015 (previously, in May 2015, count 3), severed from the indictment on 30 November 2015.

70. As for the Appellant’s claim for payment for 167 pages of PPE on discs MMA/1/161214 and MMA/2/161215, my conclusion is that the appeal should succeed in relation to the content of disc MMA/1/161214. The content of disc MMA/2/161215 should be the subject of an allowance for special preparation.

71. The claim for further payment for 1518 PPE in relation to disc CKW/1/111114 succeeds in its entirety.

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