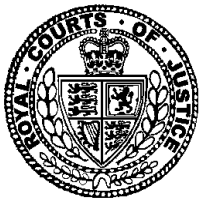

Neutral Citation Number: [2023] EWHC 1186 (KB)

Case No: QA-2022-000160

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
On Appeal from Master Whalan, Costs Judge in the matter of the Criminal Legal Aid (Remuneration) Regulations 2013
On Appeal from the Senior Courts Costs Office T20200236 at Woolwich Crown Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2023

Before :

MR JUSTICE COTTER
MASTER LEONARD SITTING AS A COSTS ASSESSOR

- -

Between :

The Lord Chancellor	**Appellant**
- and -	
Lam & Meerbux Solicitors	**Respondent**

- -
- -

Jonathan Orde (instructed by **Government Legal Department**) for the **Appellant**
Jack Holborn (instructed by **Lam & Meerabux Sols**) for the **Respondent**

Hearing dates: 26 April 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE COTTER

Mr Justice Cotter :

1. This is an appeal by the Lord Chancellor pursuant to regulation 30 (5) of the Criminal Legal Aid (Remuneration) Regulations 2013 ("the 2013 Regulations") against the order of Costs Judge Whalan made on 7th July 2022. The issue can be set out shortly. The learned Judge held that the formal page count in the Crown Court Digital Case system ("DCS") should be used for the purposes of counting pages of prosecution evidence ("PPE") within the Appellant's litigator's graduated fee scheme claim. The Lord Chancellor argues that Master Whalan erred in law and that the effect of his judgment is that the Respondent will be paid a substantial sum for reviewing thousands of blank pages.

2. By an order of 14th November 2022 Sir Stephen Stewart held the appeal was in time.

3. I am grateful to Mr Orde and Mr Holborn for their helpful written and oral submissions. I am also very grateful to my assessor, Cost Judge Leonard whose experience as a costs judge has been invaluable to me, though of course the decision on the appeal is mine alone.

Facts

4. Pursuant to a representation order dated 15th of May 2020, the Respondent represented Mr Spence in proceedings before the Woolwich Crown Court where he faced charges of money laundering arising out of a drugs investigation. The prosecution relied upon Encrochat evidence.

5. As is well known, a graduated fee scheme provides for legal representatives to be remunerated. It is governed by the provisions of the 2013 Regulations.

6. By regulation 5(1):

> "Claims for fees by litigators in proceedings in the Crown Court must be made and determined in accordance with the provisions of Schedule 2 to these Regulations."

Schedule 2 sets out the scheme by which a graduated fee is calculated.

7. In essence fees are determined by reference to a formula which takes into account, amongst other things, the number of PPE and the length of the trial. The scheme is intended to be administratively simple, and to avoid (for the most part) the need for a determining officer to consider the extent of the work actually done by solicitors and/or counsel in a particular case. It has often been stated that it is designed to operate in a "mechanistic" fashion.

8. The DCS has the facility to produce a page count in respect of a document which the Legal Aid Agency uses for the purposes of a report as to the extent of the evidence uploaded which can then be used to calculate the pages of PPE.

9. The Respondent claimed a graduated fee of £87,905.14 on the basis that there were 9756 pages of PPE as stated on the Legal Aid Agency report.

10. The prosecution appears to have served additional evidence in various tranches each under a separate notice of further evidence ("NFE"). This was uploaded to the DCS in the usual way. NFE 7 was uploaded to section J (G), NFE 8 was uploaded to section J (H) and NFE 10 was uploaded to section J (j). These documents contained data in relation to telephone handset reports. Neither Mr Orde nor Mr Holborn could confirm if the spreadsheets themselves had been served/made available to the Defence representatives. Somewhat unusually what was uploaded to the DCS was a PDF version of a "print preview" of the spreadsheets. The print preview produced large quantities of blank pages, pages containing the Excel grid but no information, or just snippets of data which in isolation are, in reality, meaningless. As I indicated during the hearing it is highly unlikely that the Defence representatives used the print preview PDF at any stage. Indeed the only purpose of creating this document which was suggested to me was that it provided a number of pages for the purposes of the report of the Legal Aid Agency ("LAA").

11. The determining officer conducted an analysis of the 3543 pages uploaded under these NFEs. In brief his analysis was as follows:

    (a) NFE 7 was uploaded to section J (G). There were three documents at 0072, 0073 and 0074 comprising (as per the DCS counting of the print preview PDFs), 603 pages, 1549 pages and 820 pages respectively. These documents were as assessed by the officer as containing 145 pages, 366 pages and 248 pages material evidence and the remaining pages were either entirely blank or almost blank.

    (b) NFE 8 was uploaded to section J (H). This was a 515 page document which the determining officer assessed as containing 217 pages of material evidence.

    (c) NFE 10 was uploaded to section J (J). This was a 56 page document with the determining officer assessed containing 14 pages of material evidence.

12. As a result the returning officer decided that 990 pages should be treated as being PPE and 2553 pages excluded. In a decision letter dated the 26th of October 2021, it was set out that total PPE had been assessed at 3798 pages resulting in a fee of £37,200.07.

13. The determining officer provided written reasons. Within those reasons it was stated that

> "…When making an assessment of the amount of electronically served material to be included within the PPE the determining officer is exercising discretion under regulation 1(5)."

And

> "The difficulty in this case is that the Excel spreadsheets…Have been saved as PDF in the print preview state to allow them to be uploaded to the DCS. This is not the same as being presented in the PDF format in the usual way and only serves to remove the functionality of Excel and renders the spreadsheet unworkable.

> This inevitably creates a significant amount of blank pages and space between the data which artificially increases the page count.
>
> The determining officer does not accept that the litigator would have considered the data in this state and would likely have used the functionality that Excel offers such as being able to use the quick search etc. As such the determining officer believes the above allowance to be a reasonable representation of how many pages actually encompass the amount for data within the spreadsheet, taking into account the vast quantity of blank pages/space and the sporadic data littered throughout.
>
> …However the relevant question is not whether PDF or Excel is the best format in which to work. The question is whether PDF or Excel gives the most realistic and representative page count for the download data which is identical in both formats save for some minor presentational differences.
>
> I do not consider the method in which the information is manipulated and the method by which the litigator is to be remunerated (do not) have to be based on the same format document. Fundamentally, the extent of the data is the same in whichever format it is presented. It is incontrovertible the nearest equivalent to a paper document is the PDF and it should be the one which is used for the purposes of PPE. The disparity in page count simply demonstrates the unsatisfactory nature of using Excel spreadsheet print preview as a method of determining the page count. In that context an important factor to take into account the calculation of fees by reference to a PPE count dates from the time when all evidence was served on paper, and that the 2013 regulations, like their predecessors, are designed to make similar provision for documents served electronically. The PDF format is designed to mimic presentation on paper. Excel is not, and can offer different page counts depending upon the way in which the information in that format is managed, used or presented. 50 pages on legible data on paper will, if reproduced in PDF format, remain 50 pages of legible data with much the same appearance. In Excel format, depending on how the same data is managed or presented, the page count could run into hundreds.
>
> There is no precise way to quantify an Excel document by reference to a page. Pages generated by the use of the print preview function will oftentimes split multiple rows of data over several hundred nonsequential pages. The material is placed into print preview will bear no resemblance to what the user will have seen on the screen and will often contain pages with little or no data on them.

> As set out in paragraph 11 of **R-v-Jalibaghodelehzi** [2014] 4 Costs LR 781 (cited with approval by Holroyde J in **Lord Chancellor-v-SVS Solicitors** [2017] EWHC 1045, the intention of the 2013 regulations is that material should be included within the PPE work requires a similar degree of consideration to evidence served in paper. By implication the format used to quantify the PPE should also be that which most closely approximates a page of paper evidence."

14. The Respondent appealed that decision. The issue on appeal was whether the PPE count should be 9756 or 3798. It was described by the Respondent (which was the Appellant at that stage) as a binary issue; whether blank pages, or pages with virtually no information on them (snippets of indecipherable metadata), should be included in the PPE count or not.

15. Costs Judge Whalan noted that the "limited but important" issue on the appeal was whether the determining officer should simply accept the DCS count or whether he/she "to reduce the count having identified pages that are apparently blank or duplicates."

16. The Lord Chancellor conceded that the page count should increase from the amount assessed by the determining officer, 3798 pages, to 5014 pages (an increase of 1,126). This is because it was conceded, in this case, "on a pragmatic basis" that files which had been identified by the determining officer as being duplicated could be included in the page count.

Decision

17. After outlining the relevant facts and reviewing some authorities (which I will address in due course) Cost Judge Whalan stated as follows;

> "The discretionary power of the DO to include to exclude (sic) datum from the PPE count at paragraph 1 (5) of schedule 2 is, as Holroyde J stated an important and valuable control mechanism which ensures of public funds are not expended inappropriately.
>
> This function, it seems to me, is carried out properly by a (sometimes broad) consideration of the substantive relevance and importance of the electronic data to the prosecution's case. I do not see that this function extends to an (often ad hoc) assessment of whether a page is technically "blank" or constitutes a "duplicate" of another page.
>
> Varied use of the Excel and/or PDF format, in circumstances where material is often converted from the former to the latter, does not lend itself easily to an accurate assessment of blank pages. The process is never blindingly obvious, as was submitted by the respondent's advocate in R-v-Everett (ibid), and it almost invariably produces contradictory conclusions, notwithstanding the amount of time and effort expended on the process. This is illustrated vividly in this case, were Mr Orde's calculations differ markedly from those of the determining officer.

> As such, the issue is whether, when substantive relevance is conceded, the PPE count should be based on the total recorded formally by the prosecution in the DCS system, or whether it should be subject to further reduction on the basis of an analysis of blank and/or duplicate pages, a process which seems to me to be invariably inconsistent and subject to variation or dispute, notwithstanding the time expended on the process.
>
> It is quite clear to me as the court has far consistently in Jankis, Dafallah and Everett (ibid), the preferable course is for the PPE count to rely on the total recorded in the DCS system. The prosecution ultimately control the upload of digital data to this system and can edit out any pages, blank, duplicate or otherwise, if they consider it reasonable and proportionate to do so.
>
> The DO still performs the core function, the important safeguard of assessment by reference to relevance and substantive importance to the prosecution case, so the function 1(5) is no way compromised by this approach.
>
> Again, however, where substantive relevance is either conceded or assessed by this criteria, so that all digital datum is considered relevant for inclusion in the PPE count, there should not be a further deduction for what the DO considers to be either "blank" or "duplicate" pages
>
> To entertain this process would be to invite repeated streams of inconsistency and dispute in cases assessed under the LGFS. It is in no way unreasonable or unjust to adopt the formal page count in the DCS system for the purpose of counting the PPE in LGFS claims."

18. The Lord Chancellor appeals against this decision and seeks to restore the assessment made by the determining officer. Having conceded the point as to duplicates; it is argued that the correct amount of pages is 5,014 and a graduated fee of £47,550.10 is payable and that the fee has been increased by a sum of £40,355.04 by the inclusion of blank pages.

Grounds of Appeal

19. The Lord Chancellor argues that:

(i) Ground One

The costs Judge erred in not correctly applying the statutory definition of "PPE" contained in paragraph 1 of schedule two of the 2013 Regulations. Had the Judge correctly applied the statutory definition he would have concluded the balance of the pages claimed on appeal by the Respondent were not "PPE".

(a) Electronic evidence is not automatically included in the PPE count unless the determining officer considers it appropriate to do so, taking into account the nature of the document and any other relevant circumstances.

(b) Electronic evidence is generally only included in the PPE count if the evidence is important in the case and requires the same degree of consideration is "conventionally served evidence".
(c) Blank pages with no information on them do not require any close consideration so large quantities of obviously blank pages should not be included in the PPE account. Instead, time spent reviewing those black pages could be the subject of a "special preparation claim" based on time actually spent.

(ii) Ground Two

The costs Judge erred in failing to recognise electronic material uploaded to the DCS is electronic evidence which is caught by the statutory definition, and it follows that this material is not PPE unless it is assessed and included in the count by an exercise of discretion based on an assessment of the material.

(iii) Ground Three

The costs Judge failed to take proper account of the determining officer's statutory duty under paragraph 1 (5) of schedule 2 of the 2013 Regulations to assess the PPE account, and in particular by concluding the page count recorded on the DCS in no way compromises the statutory discretion to assess electronic evidence.

20. In his submissions Mr Orde argued that Costs Judge Whalan had removed or compromised a wide discretion which had been deliberately provided in respect of electronic evidence. Further, that large quantities of electronic evidence can be efficiently and effectively assessed by applying the principle of approximation and evidence should only be remunerated as PPE if relevant. A determining officer can take a broadbrush approach to arrive at fair and appropriate remuneration. This approach had been adopted by other Costs Judges in relation to images within electronic exhibits.

21. Blanket allowance (inclusion) of all pages within a document would distort the operations of the scheme as a whole and would be unrepresentative of the work required. It would provide an unmerited "substantial golden bonus" as the litigator would be paid for work which was not undertaken (there being no time spent in consideration of blank pages).

22. Mr Orde also submitted that whilst the print-preview approach may be a helpful method of reflecting the data contained on a spreadsheet, it is necessarily an imperfect exercise (given that it is turning something that is not set out on pages into pages) and the process could be manipulated to produce a greater or lesser number of pages (e.g. by using portrait or landscape format). An assessment of what the pages actually show is clearly necessary given the nature of the documents.

23. He also submitted that the burden was on the litigator in an appeal before costs Judge to demonstrate why the evidence in question was relevant, had to be closely considered and should be remunerated as PPE. This is because the Appellant was instructed in the criminal trial and will know what issues arose, what evidence was relied upon by the prosecution, and what other material served was relevant.

Respondent's submissions

24. In written submissions before Cost Judge Whalan, Mr McCarthy (on behalf of the Respondent to this appeal) conceded that the data is bound to reveal gaps in some of the pages however viewed. However he criticised the approach of discounts being made for blank cells without identifying why or how data manipulation had been performed. He argued that

> "this approach is unfair and in error and sits comfortably with the general approach to remunerate pages."

25. He relied on the analysis of Master Rowley in **Campbell (SC-2020-CRI-000254);**

> "26. In relation to the litigator scheme, the precise number of pages is required notwithstanding the difficulty that that entails as indicated above. Indeed, things are made more complicated by the fact that the determining officer has attempted to manipulate the pages on the spreadsheet so as to exclude the blank or almost blank pages which inevitably arise from a print preview calculation. The amount of manipulation is a massive degree and I do not criticise the determining officer for attempting to reach an appropriate figure based on the spreadsheet. I do not think attempting to turn it into a PDF tends to be a successful method since it often simply encapsulates many blank pages as part of the PDF.
>
> 27. However, I would caution determining officers against being too rigorous in removing blank columns since, as Mr McCarthy pointed out, where paper PPE or PDF PPE is concerned, not every page is full of text in any event. This problem is highlighted by the determining officer's redetermination of the Huawei phone in the litigator's claim. It is not clear to me at all how numbers of pages which were allowed on the original redetermination have been reduced by significant percentages on the second determination of how that difference arose. I think Mr McCarthy was entirely justified in querying how that could be so."

Mr McCarthy stated

> "In the circumstances of this case and in the absence of any proper explanation for the basis of adjustment carried out by the DO on the data had been removed and why, the proper approach is to start with the pagination as it appears on the CDCS. Taking that approach sits comfortably with a move towards a CDCS based evidence platform and remunerated for work done on the material served. The format in which it appears is by the page, as with all other exhibits and statements. Applying that rationale the LAA print out shows the more appropriate pagination being that claimed at 9,756 pages. That is the third basis upon which to remunerate in this case."

26. So Mr McCarthy did not appear to dispute the existence of the discretion to not include blank pages within the PPE, rather he challenged the method of calculating the existence of such pages.

27. Mr Holborn advanced a different argument at this appeal in relation to the proper interpretation of the regulations. He submitted that once it is established that a document had been served, and had never existed in paper, the next step is to address the question of whether or not it would be appropriate to include the document within the PPE. At this stage the nature of the document and any other relevant circumstances can be considered. This could include regard to the amount of blank or uninformative pages. However the decision is binary in relation to the document as a whole and if it is decided the document should be considered as PPE then the next step is that the number of pages is then assessed without consideration of their content. He criticised Lord Chancellor's approach as wrongly eliding these two steps and as a result argued that it was fundamentally wrong.

28. Mr Holborn submitted that if a determining officer (or Costs Judge) was of the view that, given the number of blank/uninformative pages within a document it would not be appropriate to include it within PPE (so the whole of the document was excluded even if it did contain some readable content) then the litigator could claim a fee for special preparation under Part five of the 2013 Regulations in respect of the content.

29. As for the page counting exercise, if the document is considered as appropriate for inclusion with the PPE it is not relevant what a litigator may or may not have done in respect of any given page within it. The Graduated Fee scheme is not intended to require a determining officer to consider the extent of the work actually done, so it would be irrelevant if some pages could not be read and/or required no detailed consideration.) and it was impermissible to not count pages because they were blank. Mr Holborn conceded that as the Regulations did not refer to the DCS page count another method of page counting could not be excluded ("it is conceivable there may be another method"). However at present the DCS page count was the "appropriate method of doing that.

Analysis

30. Part two of schedule 2 to the 2013 Regulations sets out how the fee payable to litigators for a trial is to be calculated. The fee calculation involves consideration of the quantity of PPE. Paragraph 1 of schedule 2 states 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 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."

31. This appeal has focussed on paragraph 1(5).

32. As Mr Holborn pointed out, where there is electronic evidence which has not met the test for inclusion as PPE, an application for special preparation can be made. The procedure is set out in the same schedule at part five paragraph five as follows;

> "Fees for special preparation
>
> **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.

> (3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable—
>
> ….
>
> (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."

33. The relevant sections in relation to challenges to an assessment of fees and appeals are as follows;

> "Redetermination of fees by appropriate officer
>
> 28.— (1) Where—
>
> …
>
> (c) a litigator is dissatisfied with—
>
> (i) the calculation by the appropriate officer of the fee payable to the litigator in accordance with Schedule 2; or
>
> …
>
> the advocate, instructed advocate or litigator, as the case may be, may apply to the appropriate officer to redetermine those fees, to review that decision or to reclassify the offence, as appropriate.
>
> …
>
> (6) The applicant must supply such further information and documents as the appropriate officer may require.
>
> (7) The appropriate officer must, in the light of the objections made by the applicant or on behalf of the applicant—
>
> (a) redetermine the fees, whether by way of confirmation, or increase or decrease in the amount previously determined;
>
> ..
>
> as the case may be, and must notify the applicant of his decision.
>
> (8) Where the applicant so requests, the appropriate officer must give reasons in writing for the appropriate officer's decision.

Appeals to a Costs Judge

> "29.—(1) Where the appropriate officer has given his reasons for his decision under regulation 28 (8), a representative who is dissatisfied with that decision may appeal to a Costs Judge.
>
> …
>
> (11) The Costs Judge may consult the trial judge or the appropriate officer and may require the appellant to provide any further information which the Costs Judge requires for the purpose of the appeal and, unless the Costs Judge otherwise directs, no further evidence may be received on the hearing of the appeal and no ground of objection may be raised which was not raised under regulation.
>
> (12) The Costs Judge has the same powers as the appropriate officer under these Regulations and, in the exercise of such powers, may alter the redetermination of the appropriate officer in respect of any sum allowed, whether by increasing or decreasing it, as the Costs Judge thinks fit."

Appeals to the High Court

> "30.
>
> (5) Where the Lord Chancellor is dissatisfied with the decision of a Costs Judge on an appeal under regulation 29 , the Lord Chancellor may, if no appeal has been made by an appellant under paragraph (3), appeal to the High Court against that decision, and the appellant must be a respondent to the appeal.
>
> ..
>
> (8) The judge has the same powers as the appropriate officer and a Costs Judge under these Regulations and may reverse, affirm or amend the decision appealed against or make such other order as the judge thinks fit."

Case law

34. A significant body of jurisprudence has developed concerning the assessment of electronic evidence under the graduated fee scheme. I need only refer to some of the cases referred to within the submissions.

35. In **Jalibaghodelezhi** [2014] 4 Costs LR 781; Master Gordon-Saker held that in claims for payment under the graduated fee schemes for considering documents which have been served electronically, and have never existed in paper form, they should be treated as pages of PPE if they require a similar degree of consideration to evidence served on paper. He stated;

> "While that is enough to decide this appeal in the solicitors' favour, I would add this, as appeals on this issue are now

> numerous. The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically "taking into account the nature of the document and any other relevant circumstances". Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper. So in a case where, for example, thousands of pages of raw telephone data have been served and the task of the defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where, however, the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count."

36. In **Lord Chancellor -v-SVS Solicitors** [2017] EWHC 1045; a firm of solicitors submitted their claim for fees to the LAA, including 1,571 pages of electronic material in their total count of the pages of PPE. A determining officer refused that part of the graduated fee claim, concluding that the 1,571 pages of electronic material were unused material and therefore did not count as PPE. A Costs Judge allowed the solicitors' appeal and the Lord Chancellor appealed against that decision. Holroyde J (as he then was) cited **Jalibaghodelezhi** with approval and stated:

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

37. In my view the word "inappropriately" was intended to cover circumstances of significant overpayment; such as for consideration of pages of an exhibit that required no consideration at all because they were blank or contained no usable data.

38. In **Sereika** SSCO Ref 168/13 Master Gordon-Saker considered electronic evidence which consisted of 20,000 images on the defendant's phone. The Judge held that the vast majority of the images were not relevant and did not require any consideration. Accordingly only 5% of the images were allowed. Master Gordon-Saker stated (para 18):

> "It seems to me that in these circumstances there is no reason why a determining officer (or costs Judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real significance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than "rough justice" in the sense of being compounded of much sensible approximation; per Russell LJ in Re Eastwood [1974] 3 WLR 454 at 458. But that is the nature of the assessment of costs."

39. Mr Orde submitted that this decision supported his argument as to the proper approach in respect of pages within a document or exhibit. Mr Holborn submitted that the proper analysis of the decision was that each image was a separate document; so the Judge was not allowing only a proportion of pages within a document; rather only a proportion of the documents. I do not accept Mr Holborn's analysis of the judgment. Paragraph 1(5) refers to "a documentary or pictorial exhibit" and Master Gordon -Saker stated at para 16;

> "in this particular case the exercise of discretion is not easy. On the one hand the prosecution chose to serve this evidence as an exhibit…it is not difficult to conclude that the solicitors will have wished to look for photographs indicating that use. On the other hand it is unlikely that the vast majority of photographs will have been relevant to the task. It would seem unlikely that the solicitors will have looked in detail at each of the 20,608 images served on disc. Most will have required a glance or less."

In my view the Judge was referring to images within an exhibit. He also stated at para 19:

> "doing the best that I can it seems to me that it would be appropriate to allow no more than 1000 pages of images. That is approximately 5% of the total" *(underlining added*)

40. In **R-v-MA** [2018] 2 Costs LR 41910 the Recorder of Leeds, gave a judgment whilst sitting in the Crown Court. Mr Holborn correctly described his comments in relation to the recovery of fees under the Regulations as obiter. However they provide relevant guidance as to the use of electronic evidence. HHJ Collier QC stated;

> "30. In my judgment it is the failure to understand what is the true nature of digital evidence, that has led judges to go down the route they have done in ordering the formal service as part of the prosecution case of thousands of "pages" that in reality do not exist and which will never be read. I myself recall, while still at the bar, and when download evidence first began to be served, it was served in printed form on sheets of paper, although in nothing like the volume now involved. Litigators and advocates protested that this was unmanageable and asked for it to be served on Excel spreadsheets so that it could be searched. In no time at all that became the normal practice."

And

> "52. At para 5 there are recited the provisions of Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013 and their reference in para 1(5) to documentary or pictorial exhibits which have been served in electronic form but have never existed in paper form. They are not included within the number of PPE unless the appropriate officer decides that it would be appropriate to include it in the PPE taking into account the nature of the document and any other relevant circumstances. This is clearly critical because it does give to the determining officer ("DO" hereafter) a discretion to count such material as PPE where appropriate to do so. Of course, that is dependent upon it having been served.
>
> 53. At para 8 reference is made to the Legal Aid Authority ("LAA" hereafter) Crown Court Fee Guidance and how DOs should approach the matter. They will take into account whether the document would have been printed by the prosecution served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the DO is unable to make that assessment, they will take into account "any other relevant circumstances" such as the importance of the evidence to the case, the amount and nature of the work that was required to be done and by whom, and the extent to which the electronic evidence featured in the case against the defendant. That is clearly the correct approach as it enables the DO to ensure that those who have done necessary work will be rewarded. It is certainly not intended to grant a substantial golden bonus to all litigators and advocates simply because there was a mass of electronic data in a case."

41. In **R-v-Barrass** SC-2020-CRI -000083. Master Gorden-Saker noted that solicitors have a professional obligation to consider all of the evidence in a criminal case but that:

> "they do not need to consider in detail evidence which is obviously not relevant. The argument that all of the evidence served on a phone download should be included because the solicitor will not know whether it is relevant until it has been viewed, is not particularly helpful one. An experienced solicitor will know whether particular classes of data are likely to be relevant. In the vast majority of cases the solicitor will know the technical information relating to the operation the phone is unlikely to be relevant and will spend no time looking at it."

42. In **Jankys**; SC-2020-CRI -000107, Master Rowley considered an assessment of electronic evidence to been uploaded to the DCS. As in the present case the determining officer who only had access to the spreadsheet data in a PDF format declined to assess blank pages as PPE. Master Rowley stated:

> "18….It has been recorded in many costs judge decisions that the conversion of data on excel spreadsheets into printable pages is fraught with difficulty.
>
> …

> "20. The issue is whether it is appropriate for the determining officer to reduce the PPE by the number of blank pages that he found. It is not a course of action that, it seems to me, is one that should be widely adopted. The repeated phrase that the calculation of the graduated scheme is meant to be mechanistic individual PDF's being scrutinised page by page. I can understand why the determining officer took that approach in this case having decided that the PDF had been created from an Excel spreadsheet which is known for producing such blank pages. It seems to me to be an approach that could only be adopted in extremis.
>
> 21.Mr McCarthy challenged the appropriateness of the determining officer's approach given that it was impossible for solicitors to challenge which pages have been disallowed in the absence of any information. I think there is a good deal of force in Mr McCarthy's point albeit that it is one which, as a matter of practicality, would be difficult to deal with in any proportionate fashion.
>
> 22. Ultimately, I have concluded that I should not take the PDF as my starting point, although the determining officer had little choice but to use that document. It is a document (whoever created it) which would appear to be unsatisfactory for the purpose of calculating PPE. The difficulty in challenging the subsequent manipulation of that document by determining officer only highlights that this is not satisfactory.
>
> 23. I prefer to take the view that the document on the DCS is the one which ought to be contemplated, at least in this case. The move towards evidence being produced on the DCS is clear and if there is a reliable page count on that platform, it seems to me to be inevitable that that is the one on which reliance will be placed in due course. Whilst there are practical difficulties in The determining officer not being able to see that document, for the purposes of this case alone, I am prepared to accept Mr McCarthy's information of the page count on the DCS that it contains few if any blank pages as will be expected from the print preview to excel document." (underlining added)

43. Master Rowley was of the view that it was permissible under paragraph 1(5) for the determining officer to take the approach in an individual case that blank pages on a PDF format of a spreadsheet should not be included within the PPE, but this was not an approach that should be "widely adopted "; rather "only in extremis". On the facts before him (given what he was told by Counsel) he preferred to take the DCS calculation of the document actually uploaded as a "reliable page count" as opposed to a PDF which he considered unsatisfactory "for the purpose of calculating PPE".

44. In the present case the only document which was uploaded was a PDF print preview which, given the creation of numerous blank pages and pages with little or no data, I

have little doubt Master Rowley would have considered as unsatisfactory for the purpose producing an reliable page count to reflect the underlying spreadsheet.

45. As Mr Orde correctly submitted, Master Rowley's judgment supported his analysis that the determining officer's approach in this case was permissible, albeit that he was of the view that it should only be used "in extremis". In the present case the determining officer was faced with an analysis through the DCS counting of the PDF which led to an overpayment of over £40,000 in respect of work which was not carried out (the reading of blank pages). This was surely what the Master would have considered an extremely difficult (or extreme) situation.

46. In **Daffallah** [2020] SC-2020-CRI-000044, the issue in the appeal was the appropriate page count of the defendant's mobile phone download report which was presented in Excel schedule format. The advocates disagreed as to whether or not the page count on the DCS was as a product of activating the print preview function. Master Whalan noted

> "13...that documents produced in excel format often provoke difficulties in establishing an accurate PPE count for the purposes of the LGFS. It is often necessary, on the correct application of the discretion at regulation 1(5) of paragraph one of schedule 2 to the 2013 regulations and in order to exercise the "valuable control mechanism" cited by Mr Justice Holroyde in SVS Solicitors to look critically at the substantive content of a disputed electronic document in order to arrive at an accurate page count."

I respectfully agree. The Master then went on, to decide on "the particular facts of the case", that he accepted the submission that the page count on DCS was

> "...not simply a product of the print preview function but rather a page count formally recorded in the DCS."

Having reached this conclusion he continued:

> "it seems to me, however, that when exercising the formal (often quite technical) requirements of the LGFS, the only fair and equitable way of reaching a total PPE count -and this regard the inclusion exhibit of undoubted general relevance-is to adopt the count recorded in the DCS."

So whilst at first blush this last comment would appear to support the view that the count on DCS should be taken as the page count, consideration of the full report shows that the Master viewed the page count, on the facts of that case, as not "simply a product of having activated the print preview function". In the present case the sole document uploaded onto the DCS resulted from activation of the print preview function.

47. In **R-v-Lawrence** [2022] EWHC 355, two mobile telephones had been seized and their contents downloaded into two 'handset' reports in PDF format. The determining officer considered the reports which had been served and allowed 3,529 pages of PPE consisting of 435 pages of paper evidence and the balance (3,094) being electronic

evidence. This included a substantial amount of communication data (call logs, contacts, social groups, SMS messages, MMS messages & chats). She allowed *"5% on a broad brush"* basis of the images in the Images section; this equates to 307 pages. The appellant's sole ground of appeal related to the determining officer's refusal to allow the Images Sections in full, or in a greater amount, as PPE. The appellant's claim was for 6,164 pages in respect of these sections. The sums at stake were substantial: if entitled to the extra pages, the full amount would be £89,975.11 as against a fee as of £37,523.38 (with the option of also claiming a Special Preparation fee). Costs Judge Brown stated:

> "21. In my view Mr. Orde is right to say that there is a burden on the Appellant when seeking to assert that a higher assessment should be made, to establish that the material was relevant and needed to be considered closely. The Appellant was instructed in the criminal proceedings and will know what issues arose. The Appellant will know what evidence was relied upon by the prosecution and what evidence amongst the material served was relevant. The difficulty with assessing the pages of electronic material is that it tends to include a large amount of irrelevant material. That was the case here. The premise of the claim to include the material as PPE is that it is material that required some consideration as opposed to being material that only required a glance. In the absence of Mr. Mackrell taking me to any further relevant material I think I am entitled to assume that if there was a substantial amount of any further material which was relevant and had not been included in the allowance for 'paper' PPE then he would have been able to identify it (not least because one might assume that it was material specifically flagged up and noted as relevant when the solicitors considered it following service).
>
> 22. In any event having looked at the material and indeed sampled sections of it, I am not satisfied that I should increase the allowance made in respect of this material provided to me. The Determining Officer's allowance appears to come within the bounds of a reasonable and sensible approximation even accepting that that there are probably some other images which are or may be relevant and were not caught by those which Mr. Mackrell specifically took me to."

48. **R v Gyamfi** [2022] EWHC 2550 also concerned downloads from a mobile phone. The appellant presented the claim based upon an electronic PPE count of 54,804 pages, with the overall total capped 10,000 in accordance with the Regulations. The claim was based upon the entire volume of electronic evidence. The determining officer, focusing on those parts the download that he considered to be of sufficient relevance to justify inclusion in the PPE count, and allowed 901 pages as electronic PPE with a further 1,203 pages of image files. That figure represented 5% of the total of 24, 049 pages of image files. Costs Judge Leonard stated:

> "…in common with all telephone download reports that I have seen, the download report in this case contains a great deal of

> data which is patently of no evidential value. Where, as in this case, the report is clearly divided into separate categories such as contact, messaging and image data, the appropriate approach is first to identify those categories of data that merit inclusion within the PPE count (so, in this case, excluding for example the "Device/Installed Apps" section) and second, in respect of each of those categories of data, to identify an appropriate PPE count on the facts of the case."

49. Currently a significant proportion of electronic evidence served in criminal trials relates to the use of mobile phones. It is usually automatically generated by software and can be produced in two formats; a spreadsheet (Microsoft excel) and PDF. The spreadsheet version enables searching, data manipulation and analysis, and as a result tends to be the working document used by defence representatives. However, spreadsheets are designed for use on screen and not to be printed in a different format. The PDF Version (which I shall refer to as the "usual PDF") mimics a paper document and will automatically have numbered pages.

50. An attempt can also be made to derive a page count from the spreadsheet version by bringing up a print preview. That will display the number of A4 pages which would result if the spreadsheet were to be printed. The relevant document uploaded in this case was a PDF of the print preview. As the determining officer noted this document was neither the spreadsheet nor the usual PDF.

51. The process of creating the PDF of the print preview results in blank pages and data being split across many pages, with some pages containing limited/isolated pieces of information. The determining officer concluded, and this has not been challenged at any stage, that the litigator would not have considered the document in this state. So he was faced, in effect, with an artificial document, which had produced a page count which, by virtue of the conversion process, failed to accurately reflect the content the spreadsheet which required consideration.

52. The question as to whether electronic pages should be included within the PPE in a particular case requires a judgment, an exercise of discretion, in each case.

53. The Regulations contain differing approaches to paper-based and electronic evidence. The former is automatically paid as PPE on service whereas the latter only forms part of the PPE if the determining officer considers it appropriate i.e. the default position is that it is not counted as part of the evidence in respect of which remuneration is given.

54. If the intention was that electronic evidence was to be treated exactly the same as paper evidence there would have been no such distinction drawn and no discretion provided in relation to it, a fortiori that the overall aim was to produce a largely mechanistic process. However the rationale for separate consideration is obvious when one considers the nature of some forms of electronic evidence particularly in relation to mobile phones, which have never existed in paper form. A very large proportion of the data presented in an electronic format will be irrelevant given the limited issues in a criminal trial. Also it can often be searched to allow reference to material aspects and the whole mass of data does not need to be considered.

55. An assessment of the electronic material is undertaken by the determining officer as to whether it is appropriate to "count it in". This was described by Holroyde J as an important and valuable control mechanism to ensure that public funds are not expended inappropriately. As I have set out it is my view that includes significant overpayment for work obviously not undertaken.

56. The LAA report will set out a number of pages of electronic material uploaded onto the DCS system. However that is a starting point and no more. Were it otherwise, and that figure to be regarded as a blanket allowance, it would neuter an express statutory provision requiring an considered assessment and effectively treat such material as paper evidence.

57. I accept Mr Holborn's submission that the presence of blank pages within a document could potentially be relevant to the nature of the document and/or the relevant circumstances given that;

    (a) A substantial amount of blank pages may arise as a result of formatting, and
    (b) Such pages do not contain any relevant evidence which required consideration.

    However I do not accept that a determining officer (or Costs Judge) must adopt the rigid two staged approach he suggests is mandated by paragraph 1(5). Rather the discretion is a broad one, reflecting the varied nature of electronic evidence, and there is nothing to prevent the approach taken by the determining officer in this case. The lodestar of the assessment of electronic evidence is the aim to ensure that remuneration is appropriate and to avoid either underpayment, when consideration has been given to its content, or overpayment, through "golden bonuses", simply because there is a large volume of such evidence, even though it has not been considered. The fact that either would result from taking a particular figure for pages is an obviously relevant circumstance which not only could, but should, be taken into account.

58. Contrary to his submissions Mr Holborn's approach would create greater uncertainty and in all probability, more challenges given that his first step; the assessment of the nature of the document could, as he accepted, include consideration of blank pages. The assessment of what amount/percentage of blank pages would change the nature of a document such that it was not appropriate to include it as PPE would doubtless become a very fertile area of dispute.

59. Also Mr Holborn's analysis does not avoid the need for a page count. He accepted that no specific method was mandated by the Regulations. Again this is not surprising given the nature or electronic evidence and its changing nature. Even on his analysis at the second step the determining officer did not have to use the DCS figure if some more accurate and/or suitable method was appropriate. In my judgment there was, and is, no obligation to slavishly use an page count on DCS if it is clear that it arises from what is, in effect, an artificial document produced by conversion from the working document, solely to produce a number of pages and which, by virtue of the conversion process, would result in a number which does not reflect the work which was undertaken and significant overpayment. It does not produce what Master Rowley referred to in **Jankys** as a reliable page count. That was the unusual position in this case.

60. In concluding that the function of the determining officer did not extend to an ability to assess whether a blank page could be considered as PPE, and that when relevance was conceded there should not be a further reduction for any blank pages, Costs Judge Whalan fell into error. There is simply no basis for such limitations of the broad discretion specifically given by the regulations; particularly as it would axiomatically result in very significant overpayment.

61. The observation that the form of the material "does not lend itself easily to an accurate assessment of blank pages" cannot provide a justification for the conclusion that there is no discretion to deviate from an obviously artificial and inflated figure.

62. In my judgment, as was recognised in **Sereika** and **Lawrence**, when conducting any assessment of electronic material there is nothing wrong, if it necessary and appropriate, with a rough and ready analysis; a "sensible approximation". It is an entirely proper approach to consider the content of a documentary or pictorial exhibit and conclude that only a proportion of the pages should count as PPE. The perfect must not be the enemy of the good in this regard. Disagreement between parties as to whether there are 1,000 or 1,500 blank or data free pages in a 3,000 page exhibit may result in a broadbrush assessment, but the potential for disagreement, could not justify the conclusion that all 3000 pages should be seen as PPE.

63. If considered necessary documents and/or information can be requested under regulation 28(6) (or in respect of an appeal to a Costs Judge regulation 29(11)) to assist the assessment process. However blank pages contain no evidence and I struggle with the proposition that the assessment of whether a page is technically blank (whatever that means) is not blindingly obvious. It takes a glance and no more.

64. Accordingly for the reasons set out above the Costs Judge fell into error and the determining officer was well within his rights to exclude blank pages in the assessment of PPE. Indeed I can see no reason not to do so as a matter of principle, the sole issue being the extent to which it is possible to carry out a reasonable and proportionate assessment of the number of pages which were actually blank.

65. As a result, I set his order aside and restore the order of the determining officer subject to the concession in relation to duplicated material.

66. Finally, I would make the following, I hope helpful, observations.

67. Firstly, remuneration for detailed consideration of pages which could require no consideration is axiomatically overpayment. However, in any broadbrush assessment proportionality may play a part and in an appropriate case, a determining officer or Costs Judge may take the view that the assessment of the number of blank pages is not worth the candle. The odd blank page within a large body of electronic material is unlikely to be identified as a matter requiring to be addressed.

68. Secondly, whilst it may be desirable for the CPS to remove blank pages in documents to be uploaded, in some cases this may often be a disproportionate task for a public body. Given that the information is electronic it is also difficult to see the mischief. The reality is that any blank pages will simply be ignored. The picture may be different if the information is duplicated, as this may not immediately obvious; resulting in timing spent considering the content. The effect of Master Whalan's approach would be to

place the burden on the CPS to undertake an audit in each case, in respect of any document which is to be uploaded "if they consider it reasonable and proportionate to do so" to identify blank pages in the knowledge that a failure to do so will axiomatically result in overpayment out of public funds. I cannot accept this analysis is correct. The limitations of the public funding of, and consequentially effects upon the resources within, the criminal justice system are well known. I cannot accept that it is right that the burden solely lies upon the CPS to avoid a solicitor being paid for the (detailed) consideration of blank pages. However I do question the approach of solely uploading a print preview of a spreadsheet. The conversion makes it is an unusable document and an unreliable guide to the extent of the data within the spreadsheet. It appears to me that it is highly likely to result in a significantly inflated page count. Given that the concern is the appropriate use of public finances the CPS should evaluate the issue and consider some national guidance.

Conclusion

69. The Appeal is allowed and the order of Master Whalan is set aside.

70. The Appellant conceded the point as to duplicates; so the correct amount of pages is 5,014 and a graduated fee of £47,550.10. I leave it to the parties to prepare a draft order.