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Case No: T20217105

SCCO Reference: SC-2023-CRI-000078

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 5 August 2024

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

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

NOBLE SOLICITORS

Appellant

-and-

THE LORD CHANCELLOR

Respondent

The appeal has been unsuccessful. I allow (subject to any clarification of the precise calculation) 2096 pages of ePPE for the disputed material in this case, being the material served in A1 PDF format.

REASONS FOR DECISION

1. The issue arising in this appeal is as to the correct assessment of the number of pages of prosecution evidence ('PPE') when determining the fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known and explained in more detail in the decision of Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE (subject to a cap of 10,000 pages), and the length of the trial. The dispute in this case concerns the extent to which evidence served in electronic form should count toward the PPE.

2. There is quite a lengthy procedural history to this appeal. At the hearings on 26 January 2024 and 2 May 2024 the Appellant was represented by Mr. McCarthy KC, counsel for the Appellant. At the first hearing the Respondent, in effect Legal Aid Agency ('the LAA'), were represented by Mr. Orde, an employed barrister. I received detailed and helpful written submissions from Mr McCarthy and Mr. Orde. However submissions were not completed at that first hearing and Mr Orde was not available when re-listed so that Ms. Quarshie, who is a Chartered Legal Executive, took over in his place. At the hearing on 2 May 2024 the Appellant sought permission to serve further material after the haring which I gave. This was provided on 23 June 2024 and a response was received from the LAA to that material on 3 July 2024. I invited the parties to consider whether a further rehearing so that the parties could make further representations on this material but neither party considered one was necessary and I have been left to consider that material having regard to the submissions that have been made at the earlier hearings.

Background

3. The Appellant is a litigator who represented the Defendant, Ashley Bowen, pursuant to a Representation Order in proceedings before Crown Court at Swindon. The Defendant was charged with conspiracy to supply class A drugs. The case concerned the organised supply of class A drugs (heroin and crack cocaine) in a County Lines operation between August 2018 and April 2020. His defence was that the Defendant had been a drugs consumer and was not a supplier or party to the conspiracy alleged. The matter proceeded to trial, the Defendant changing his plea shortly (a matter of days, I think) after it started. The trial resulted in other defendants being convicted.

4. In the course of the investigation various telephones were seized, some of them being that might a called 'burner' phones (being as I understand it readily disposable) and some were more conventionally used as everyday mobile phones. In any event evidence of call data was also obtained by the Prosecution from various telephone companies pursuant to a Production order. I shall refer to this evidence as 'call data records'. It was provided electronically in various formats including in particular PDF format and Excel format. It is accepted that, as a category of evidence, the call data records are to be treated as served

evidence for purposes of the relevant provisions and it is the consideration of this material which forms the background to the dispute in this case about the amount of PPE.

5. The overall PPE was assessed at 7853 pages by the Determining Officer giving rise, to a fee of some £59,900 (plus VAT). Of the PPE allowed, 1876 pages was allowed in respect of evidence in paper form; the balance was in respect of electronic evidence of which call data formed at least a substantial amount. On appeal, 10,000 pages of PPE is claimed which, if allowed, would lead to an increased payment.

The relevant provisions

6. It is common ground that under Regulation 29(12) of the 2013 Regulations I am to consider this matter afresh, with the possibility that I might allow more or less in respect of PPE than was allowed by the Determining Officer.

7. As to allowance of PPE, paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide:

(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).

(3) The number of pages of prosecution evidence includes all —
(a) witness statements.
(b) documentary and pictorial exhibits.
(c) records of interviews with the assisted person; and
(d) records of interviews with other Defendants,

which form part of the served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which —

(a) has been served by the prosecution in electronic form.
and
(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances."

General guidance and practice on the allowance of PPE served in electronic form ('ePPE') under Regulation 1(5)

8. It is clear that it is not of itself enough for the material to count as PPE that it be 'served'. When dealing with the issue as to whether served material should count as PPE, Holroyde J in *SVS*, said this:

> *"If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.*
>
> *If an exhibit is served in electronic form but the Determining Officer or Costs Judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by Paragraph 20 of Schedule 2".*

9. It is also clear that downloaded material need not be regarded as one integral whole, as a witness statement would be, and that when exercising discretion under paragraph 1(5) a qualitative assessment of the material is required, having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *SVS* (including in particular para. 44 to 48), and the Crown Court Fee Guidance (updated in March 2017)

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

> *"In relation to documentary or pictorial exhibits served in electronic form (i.e., those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –*
>
> "*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' <u>such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the Defendant</u>*." [my underlining]

11. At paragraph 38 of Appendix D, the Guidance gives examples of documentary or pictorial exhibits which will ordinarily be counted as PPE. They include –

> "*Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the Defendant's case*.
>
> *Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the Defendant's case, e.g., it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the Defendant's involvement*.
>
> *Raw phone data where the case is a conspiracy, and the electronic evidence relates to the Defendant and co-conspirators with whom the Defendant had direct contact.*

12. Holroyde J, also cited, with approval part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi* [2014] 4 Costs LR 781 to the effect that when dealing with documents which are served electronically and have never existed in paper form, the issue to consider -in deciding whether material should be treated as PPE - is whether the material requires a similar degree of consideration to evidence served on paper (the costs judge was then concerned with earlier Regulations but any difference with the 2013 Regulations is not material).

13. In *Lord Chancellor v Lam and Meerbux Solicitors* [2023] EWHC 1186 (KB - Cotter J held at [57] as follows:

> "…*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*…".

13. Although Cotter J was then concerned with an issue as to whether blank pages should count as PPE material, I reject Mr. McCarthy's contention that this and other such passages in the judgment were directed solely at such an enquiry. Cotter J cited with approval the approach set out in *Jalibaghodelezhi* which has been the standard approach and, to my mind, is too well established to be open to serious doubt. He plainly had at the forefront of his mind the point that the discretion under the scheme to be exercised to ensure public funds were not expended inappropriately (see [36-37]). Referring to the paragraphs of *SVS* cited above at [8], in which Holroyde J referred to the factors in the LAA guidance as an important and valuable mechanism which ensures that public funds are not expanded "inappropriately", Cotter J stated at [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 <u>contained no usable data</u>."* (my underlining)

14. It is perhaps important to note that even if material is not to be regarded as PPE, it may be remunerated by a Special Preparation Fee provided for in paragraph 20 Schedule 2 of the 2013 Regulations. Such a fee is based on time actually spent; that is to say, the number of hours the Determining Officer considers reasonable to view the evidence other than that allowed as PPE (see *R v Sana* [2016] 6 Cost LR 1143). Much material served in electronic form simply needs to be checked to see whether it contains anything relevant and often a Special Preparation Fee can be an appropriate form of compensation for such work.

15. It is also, I think, well known and generally accepted that it is in the nature of much electronic evidence (typically downloads of mobile phones) that it contains a significant quantities of irrelevant material. In respect of the task of determining the amount of PPE in such circumstances Cotter J referred in *Lam and Meerbux* to a passage in *R v Lawrence* [2022] EWHC 3355 (a decision of my own) in which I said that because there is often a significant amount of irrelevant material there is a burden on the Appellant in an appeal when seeking to assert that a higher assessment should be made, to establish that the material was relevant and needed to be considered closely. This is because the Appellant was

instructed in the criminal proceedings and will know what issues arose, what evidence was relied upon by the prosecution and what evidence amongst the material served was relevant: it is a premise of the claim to include the material as PPE that it is material that required some reasonably close consideration, as opposed to being material that only required a glance [21].

17. It is not uncommon for material in electronic form to be served in both Excel and PDF form (in this case it was also served in csv format). It is common ground that in general where material is served in both PDF and Excel formats, whilst the material is best considered for the purposes of assessing the work down the litigators and advocates in PPE format, the material is often actually considered by litigators and advocates in Excel form. Excel has a far greater degree functionality though filtering and the like, which permits the material to be considered efficiently. However pressing Print Preview in Excel will very often produce a 'page' count in a figure significantly higher than PDF but, for reasons it is not necessary to go into, such a count may not be indicative of the work involved and it is not generally to be taken as the page count for PPE purpose. As it was put in *R v Daugintis*. 154/17 the PDF format can often provide a better indication of the work involved. This is because, as Costs Judge Leonard explained in *R v Zigaras* and *R v Nikontas 155/18 197/18, 2432/18 275/18,* PDF mimics to a significant extent a paper page. Mr. McCarthy did not dispute this general approach. It seems to be clear that this approach has often been considered as an appropriate indication of the amount of work involved particularly where the 'page' in the PDF material is in A4 format. In this context A4 is taken to be the standard page size for printed material and the material captured by such a 'page' can be expected to given some indication of a printed page.

18. Finally and importantly, it has been held that in the context of a documentary or pictorial exhibits in electronic form it is open to a Determining Officer, and on appeal a Costs Judge, to conclude that only a proportion of the pages should count as PPE if it is necessary and appropriate, with a rough and ready analysis, or sensible approximation (see: *R v Sereika (2018) SCCO Ref 168/1* decision of the Senior Costs Judge Gordon-Saker). In Lam *and Meerbux*, Cotter J endorsed this approach commenting:

> "*The perfect must not be the enemy of the good in this regard. Disagreement between parties as to whether there are1,000 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* [62]."

19. As I see it, one of the issues that arises in this case is whether this process of 'sensible approximation' should apply in the context of considering call data records, it being well established and accepted as the correct approach when considering documents in electronic form that include pictures (generally the Images section of a mobile phone download).

The background to the issues in this case

20. Various telephone companies (EE, O2 and Vodafone) which provided the call data records did so from data generated by call masts over a set period. Such material is of considerable importance to a prosecution in establishing likely contact with other defendants or presence at certain events or locations.

21. Mr McCarthy is experienced in dealing the type of evidence explained. He explained that this type of material will often enable the prosecution to pinpoint with reasonable

accuracy[1] a particular phone and hence, ordinarily, the user of a phone, and if the phone can be attributed to a person, to that individual at a particular location. The material provided when a call is made or message sent can indicate whether the phone is moved from the point when the call began and thus might indicate, for instance, whether a caller or the receiver of a call is travelling to a particular location. As here, the material can also provide evidence of substantial contact by messages and calls between two individuals. The date, timing, frequency and length of calls can be probative of a conspiracy. Similarly, information as to whether calls are incoming or outgoing, if the call went to voice mail, the pattern of calls and those that preceded it may also be relevant.

22. The raw data generally provides the IMEI number (being the handset number) and the IMSI number (being the number of a SIM card). It is provided in the form of a table which sets out, in particular, the time a call is made and when it is finished and when a message is sent. The analyst producing the schedules need not have general technical expertise, merely sufficient expertise to carry out the search (and explain, for instance, how the search is carried out). The key data required to locate a phone or phone use will need to include the date, time, post code, and the cell ID: elements of the data are generally selected by an analyst who will set the material out in a cell site map (to show the location). To demonstrate contact between individuals material can be condensed into schedule which may be colour coded to show when and between which numbers the contact took place.

23. The amount of raw material can be very large. In this case I have been provided with samples in PDF form. Mr. McCarthy took me through a number of documents in PDF form which divided into columns and rows. It is plain to me that at least some of the columns in the table would not need to be looked at closely by the prosecution of the defence. Indeed, in Excel, as I understand it, material can be filtered. So even though a table in Excel was very large, if one wanted to see just the calls or message to and from particular numbers (to establish contact between two individuals) all other calls could be filtered out, similarly one could filter the material to capture material relevant to calls on a particular day.

24. Mr. McCarthy explained that such evidence is often the main evidence in a conspiracy such as this. One individual may have been arrested with a considerable amount drugs ('A') but it is the call data which will be relevant in determining whether A has had extensive contact with another defendant ('B') and call data may link this Defendant with another Defendant 'C' and so. The essence of a County Line is that there is a mobile phone from which bulk messages are sent to drug consumers and individual orders are taken. In this case the line was called the 'Hector line' and contact between the alleged conspirators and the holder of the 'burner' phone on which incriminating material has been found will have been important.

25. Mr. McCarthy explained at the first hearing that in his role as defence advocate the first part of his job would be to <u>check</u> that the prosecution's account of the material is correct. I understood from him that this does not involve a complete checking of every entry in the material (an exercise which he said would take weeks) but as I understand by what he referred to as 'dip sampling'. The second part of the exercise is then to <u>contextualise</u> this material; this may require the advocate or litigator to consider on instructions whether material which might be relied upon to pinpoint an individual to a particular one location should be considered alongside other material might show that he was, for instance,

[1] Using azimuths which indicates within an aliquot of three the angle from a mast where the phone is located.

meeting up with a girl friend; in respect of call data showing contact between two individuals it might be necessary to consider whether there was an innocent explanation for any contact. Plainly the Defendant's instructions would need to be taken on the material and in this process there may need to be particular consideration not just of the material specifically relied upon by the Prosecution but also some of the original data, the call data records.

26. It was not initially clear what analysis was in fact undertaken by the Appellant litigator. Mr. McCarthy had attempted to explain what generally happens from his own perspective. I took that also to be a reference also to what others would and an indication of what was generally required. The fact that the litigator may not have done any of the work (or may have done less work than the advocate) on raw data is, of course, irrelevant. EPPE is not assessed by reference to the work actually done (in contrast to a fee for Special Preparation).

27. 'Upscaling'. I should add that a problem with determining the ePPE can arise if the material served in PDF has been reduced in size so that if printed out in the A4 format it would not be legible and would have to magnified up to say an A3 or A1 size to be legible. Indeed some of the material in PDF format may mimic A1 size (59.4 cm by 84 cm) or A3 (29.7 x 42 cm). Thus, if the material were considered to be paginated it might be understood to contain more than a conventional A4 page. An A1 page is, as I understand it, some 8 times larger than A4, and an A3 page twice the size of an A4 page. If each A1 'page' in PDF were to count as one page for these purposes but contained, say, 8 times the amount of material it might be said that it might not properly reflect work undertaken and, it is suggested on this basis that the number of 'pages' require multiplication by a factor, or 'upscaling' as it has been called, so as to reflect the fact that there is a greater amount of information on a sheet of A3 or A1 page than an A4 page.

28. In this case much of the material served in PDF form is in A3 and A1 format. An agreement has been reached by the parties as to the treatment of the material in A4 and A3 form and the issue that arises for me to decide is the allowance to be made for material served in A1 format.

The decision of the Determining Officer

29. The Officer took as his starting point the 'pagination' in PDF. He considered that had the material been produced in a paper format, whether A1 or A3 or A4, the printing would have had to be at the format necessary to provide a legible result on the least number of pages. He considered that some upscaling was appropriate in a case where electronic material was displayed in an A1 and A3 page size and applied an upscaling factor of four for A1 material and a factor of two for A3 material. He said that to allow anything more would disrupt the fair and economic balance of remuneration for a case.

Arguments on appeal

30. The Appellant contends that I should allow all the 'pages' in PDF A1 format after upscaling by a factor for 8 each individual 'page'. That is to say, for each 'page' of PDF I should allow 8 pages of ePPE. Mr. McCarthy submits in outline that what he refers to as the "principle" of upscaling is a mechanism that allows for fair remuneration and in the context of PDF reports (as opposed to Excel documents), once a page, as he put it, is remunerable

by a specific multiplier (the 'upscale'), no further adjustment is appropriate. He said there is no way to redact blank cells or columns in PDF and so the fairest and most workable solution is to remunerate the report rather than by a page-by-page analysis.

31. Mr. McCarthy referred me to decisions by other Costs Judges on this point. In *Zigaras* Costs Judge Leonard 'upscaled' material which he considered had been minimised so that it was not legible, to a size at which considered the material would be legible. In *R v Francis* SC-2020 Ref: 20-20-CRI 000004 Cost Judge Rowley took a somewhat different view and said that he did not need to consider the size at which information as legible (what he referred to as an "*opthalmic measurement*"); it was, in his view, necessary to look at the size of the document and award the equivalent number of A4 pages. He applied a multiple of 8 to material served in A1 PDF format. In *R v Wadsworth and Ogdan Hooper* SC-2021-CRI-000024 Costs Judge Leonard commented that the allowance for ePPE is not made on the basis of a spreadsheet, but the PDF equivalent of sheet of pages and that "[a] *page is page, even if some of the columns on the page may be empty*": he held that he should take what was referred to as a mathematical approach contended for by the appellant in that case and treat each of the pages in A1 format as 8 pages of A4. In doing so he acknowledged that the approach may produce a page count in excess of that appeared, on the LAA's submission, would be derived from the Excel version but held that if it were right to use the PDF 'page' count then that was not relevant.

32. Mr McCarthy says that the approach illustrated by these cases is also consistent with the principles adopted in other cases of taking a broad approach. To do otherwise risks a disproportionate amount of work by the Litigator, Counsel and the Determining Officer in determining the ePPE.

33. The LAA say that as a starting point only it is appropriate to multiply a A1 PDF page by 8 and an A3 PDF page by two to ascertain the equivalent number of A4 pages for the purposes of the graduated fee scheme. However it was argued by both Mr. Orde and Ms Quarshie when it comes to call data records, which contain raw data, there is a real risk of overpayment from this approach. This is because some of material will include technical metadata which may not be relevant; some cells are blank or contain the words "N/A"; and in some instances, splitting rows and columns over eight pages mean each pages does not contain much substantive material at all. They argued that the correct approach is one of 'sensible approximation', in each case, a second stage test should be applied to each document/'page' and adjustments should be made to reduce the multiplier (upscale), taking account of blank cells or irrelevant data.

Decision

34. In the course of the hearings I raised what I considered to be a possible difficulty with the process of determining ePPE that underlay the approach of the Appellant, and it seemed to me, the LAA.

35. In the event I am not sure that there is any disagreement about the correct approach. It is, of course, to be derived from the terms of subparagraph 5 of 2013 Regulations. This subparagraph provides that the Determining Officer, and on appeal the Costs Judge, is required to take into account to the nature of the document and all the relevant circumstances in deciding whether it would be appropriate to include it in the pages of prosecution evidence. The relevant material will be in electronic form and not have been

printed out. The assumption must, it seems to me, be that electronic material will not be in paginated form. This, to my mind, is clear for the terms of the Regulations: at the risk of stating the obvious, a page is a sheet of paper and since the material is not in paper form there are no sheets of paper and hence no "pages" for these purposes.

36. In *Lam & Meerbux* Cotter J cited (at [40]) the following passage of the former Recorder of Leeds, HH Judge Collier QC, in *R-v-MA* [2018] 2 Costs LR 9. which to my mind underlines the point:

> "*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 b searched. In no time at all that became the normal practice."*

37. Perhaps paradoxically, the material is only allowed as pages of prosecution evidence but that does not mean the material which has served should be taken as being in paginated form. The job of the assessing judge or Officer it not to count pages in which electronic material is served. The process of ascertaining of a page count for PPE purpose requires the exercise of discretion. And, at the risk of repetition, as Cotter J emphasised in *Leer & Meerbux*, the *lodestar* by which that discretion is to be exercised is the aim to ensure that remuneration is appropriate and to avoid either underpayment or overpayment.

38. That 'pages' of PDF are not necessarily pages for ePPE purposes is confirmed by a general consideration of electronic material. As Mr. McCarthy accepted, material served in Excel form is not paginated. It forms one large – and in some cases a very large- spreadsheet. Material in such a form may be printed out but it is not served in this form and, generally, if it were printed out in pagination form it may be difficult to interpret unless it is substantially rearranged. The Regulations however plainly contemplate that such material could count as PPE even if it is the only form in which the material is served.

39. Further, such an approach is consistent with the practice of 'upscaling' PDF material in the way that I have described. If material served in PDF form were to be regarded as paginated for the purposes of the Regulations, any such pagination should dictate the amount of pages to allow for PPE purpose. One 'page' of PDF would count as one page of ePPE. But the process of upscaling assumes that one 'page' in PDF may count as more than one page of PPE because it contains more material than would appear on a conventional legible A4 page. As discussed, there plainly are good reason for doing this (otherwise it would be open the prosecution to reduce PDF sizes to minimise the fee payable without reference to the amount of work that had to be done). Exercising the relevant discretion appropriately means that one 'page' of PDF may in fact count for more. The jurisdiction to take such approach obviously assumes that PDF material merely mimics material in printed form but is consistent with a reading of the Regulations that such material is it is not treated as served in a paginated form.

40. The approach set out in *Daugintis/ Zigaras* does not does not therefore make a 'page' of PDF a page for PPE purposes. But because PDF mimics pages of printed material it can provide a ready scale against which the payment of work can readily can be estimated. It is, it seems me, not to be overlooked, that where material is in fact also available in Excel form the material will generally be considered in Excel form and this provides a functionality that enables it to be considered differently from the printed page. Indeed as I understand it PDF editors, which can be acquired at relatively modest cost, generally allow the reader to focus on and skip to relevant entries (using the 'find' function). The mere fact the PDF provides some measure as to the work required is not, in my view, sufficient to regard it as printed material. It is still electronic material and the feature about electronic material which to my mind underlie this discretion is that it tends to be replete with irrelevant material that does not need any close consideration and which can be filtered out given the higher degree of functionality that exists in Excel, and can be avoided using the search function in PDF more efficiently than a printed page could be.

41. To my mind Mr. McCarthy, and indeed perhaps to some to extent LAA, ware elevating the *Daugintis/Zigaras* approach and the so-called principle of 'upscaling' to principles of law which are founded on 'pages' in PDF constituting pages for the purposes the scheme. To my mind, as the approach in *Lam and Meerbux* makes clear, the process of using 'pagination' as it appears in PDF form and indeed upscaling are tools which are used in the exercise of discretion to ascertain a page count which is intended to reflect the amount of work reasonably required. If the work required to consider information on A1 is about 8 times that which is found on an equivalent A4 page then then that may be a good starting point.

42. Mr. McCarthy argued that in PDF, unlike in Excel, blank cells cannot be removed, therefore the litigator is to be compensated on the basis reviews of each 'page'. The same he contends is the case in respect of cells which were not blank but which but contained no relevant material. I do not however see why any legal representative would review the material in PDF form once it was established the material served in multiple formats was the same material. The advocate or litigator can be considered on an Excel spreadsheet and irrelevant material can be filtered out; the relevant material can be identified, highlighted through use of colour coding and instructions can then be taken on it. That is likely to take far less than time than using the PDF format or considering documents printed from the PDF version. In such circumstances, to compensate litigator for doing work on the basis that the work would be considered in PDF or in printed form would not be consistent with the approach in *Lam & Meerbux*.

43. Even if the litigator were to look at the material in PDF it is open to use the 'find' function to go to the relevant entries more efficiently than would be possible if the material were served in paper form. As Costs Judge Leonard accepted in *R v Rimon Ali* [2024] EWHC 1699), the ability to use filtering and find functions must have a bearing on the allowance to be made. Accordingly, I do not accept the rigid approach Mr. McCarthy asked me to take. Simply to say that because some of the material on A1 page required considering closely and that because A1 is generally 8 times larger than an A4 page therefore one 'page' of PDF material in A1 format counts as 8 pages of PPE obviously risks substantial overpayment. If Mr. McCarthy were right it would mean that if there were just one relevant potential relevant entry in only one row of material on A1 that required close consideration but the material was otherwise irrelevant it would nevertheless count as 8

pages. Whilst having the virtue of simplicity Mr. McCarthy's mechanistic approach has, in my judgment, a clear tendency to overcompensate the litigator.

44. I remind myself that in exercising the discretion I am required to have regard to the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the Defendant. There is no question in this case that call data was important material in the case against the Defendant and needed to be considered. The Defendant pleaded guilty at some point after the case was opened. However, it is clear from the Prosecution's Opening Note that in general the call records data was important material.

45. It was alleged that a co-defendant Osman Barry was the leader of the group and he was said to have sent out messages directing others to supply drugs. Investigations carried out by the police revealed that a phone number ending 7026 had drug related messages on it. This phone was attributed to a co-defendant Peter Collyer. It is clear that the other defendants would want to distance themselves from or explain any contact with this number.

46. Information in respect of contact between defendants and some cell site data were detailed in a report and schedules and served as part of the paper evidence. This material has counted as part of the paper PPE. A Note produced for the purposes of the taxation and relied upon in this appeal sets out an analysis by the Appellant of that data. It is not necessary for me to set that analysis or all the contents of the Note or indeed the matters which appears in the report or the schedules served I have them fully in mind. There were said to be a large number of calls between a number attributed to Peter Collyer (ending 7026) and a number attributed to Osman Barry (2023). Investigation also appeared to reveal substantial contact between the number ending 2023 attributed to Osman Barry and the number ending 3139 attributed to the Defendant. There was a substantial amount of the material said to link Osman Barry with other co-defendants and material linking and locating other defendants. −

47. As I understand when arrested heroin and crack cocaine were found on the Defendant with a street value of £840 and £480 respectively. As I note above, he accepted that he was a consumer but said that he was not a supplier of drugs. The attribution of the phone number ending 3139 to the Defendant was not in dispute. I do not intend to provide a comprehensive description of the relevant material that needed to be looked at closely when I refer to the Note suggesting that the prosecution relied on some 45 calls between this number and Oman Barry (the number attributed to him ending in this regard 9963). The Note also said that shortly after arrest on 17 January 2019 Osman Barry is said to have made attempts to contact the Defendant Peter Collyer (on 7026) and the Defendant (on 3139). The report of the analyst, Mr Anger, also refers to other material and possible 'bulk text' material involving the phone attributed to the Defendant (see page 39-40 of the report) and further contact between this number and numbers which appear attributable to Osman Barry (2023 and 9963).

48. The Defendant said that he had known Peter Collyer for 10 years but had had no knowledge that he had been involved in the supply of drugs and asserted he was fellow drug user. He says that whilst 'sofa surfing' at the flat of Peter Collyer in November 2018 he assisted him by calling an ambulance when Mr. Barry suffered injury to his arm/elbow. It is said that that that they exchanged numbers for social purposes only and not in furtherance of any conspiracy to supply drugs. The Defendant said that he had no knowledge that

Osman Barry may be involved with the supply of drugs. There appears to have been no suggestion that he had other social contact with these other individuals. He denied any knowledge of or involvement with the 'Hector 'line and any knowledge of any persons any persons associated with it, He says that on 17 January 2019 he was in the company of Peter Collyer and another individual called Kieran Bradley for a legitimate purposes- to give them a lift to probation meeting. It appears also that he accepted that he may have used other people's phones when low on credit (phone number ending 7092 in particular) but this was not in furtherance of a conspiracy.

49. Various attendance notes produced after the last hearing show that an individual at the Appellant solicitors did consider the raw material, the call data records. It is clear to me that further analysis was required of this raw data. It needed to be checked and considered to see whether, for instance, there was contact with the Defendant at the same time as, say, contact between Peter Collyer and Osmen Barry and other communication which could relate to the supply of dugs. Such connections could, of course, be probative of the allegations.

50. These attendance notes suggest that the process of considering the material took a long period of time- a substantial number of days (some 8 days it would appear). It appears however that the material was considered in PDF format. It is not explained why the solicitors were doing it in this way, and not considering the material in Excel form. Nor indeed, even accepting that there was a substantial amount of material, why it took so much time given the ability to use the 'find' function in PDF.

51. It is not disputed in this case that the relevant underlying call data records needed to be considered and should, at least in part, count toward the PPE. It is clear that some consideration may have been required of the raw data which did not directly involve the Defendant. But much of the time appears to be have been spent painstakingly going though the material in PDF form to look to see whether there were calls from or to the phone attributed to the Defendant- phone number ending 3139- and the 7092 phone substantially attributed to Peter Collyer but which the Defendant had indicated that he may also have used; also, the use of phones ending 2023 and 9963 attributed to Osman Barry. I would however expect the relevant contact (by calls and messages) could be isolated using the filtering function in Excel fairly quickly or indeed located by the 'find' function in a PDF editor again fairly quickly.

52. There are 1048 'pages' of material which are understood to be in PDF format and which are understood to mimic an A1 page format. They are found amongst a series of files which are labelled with the letters 'AMS' followed by a number. LAA's submissions relate specifically to this material which was provided by O2 and Vodafone.

53. The O2 reports have 35 columns of data. The LAA say that many of the cells contain irrelevant material ie 'N/A and' they suggest that 12 columns only contain relevant material, those columns being:

a. Call Date & Time
b. Call type
c. Calling number.
d. Called number.
e. Calling EMI
f. Calling IMSI

g. Duration
h. Call ID
i. First Cell ID
j. First Cell Postcode
k. Last Cell ID
l. End Cell postcode.

54. It is said by the LAA that an A1 page should count as about 2 pages of PPE (on the understanding that about 6 columns and 22/33 rows would fit on each A4 page). In the alternative, if all 35 columns are relevant then a sensible approximation would be led to an approximate reduction of about 40-50%.

55. The A1 'pages' in the Vodafone report contain 8 columns. Although it is said that they would contain relevant material, if they were notionally split up into different 'pages' it is said that there would be very little information from each column on each page. For example, a page with 13 columns, if split across eight A4 pages, constitutes 1.63 columns per page; and if approximately 23 rows are split across eight A4 pages, which is only 2.9 rows per page.

56. Mr. McCarthy's response to this case is in effect, that a 'page' is page: if you start determining the page count by reference to the PDF material you cannot then have regard of the fact that material on any particular 'page' is irrelevant. Taking one page of A1 material and multiplying it by 8 gives a figure of over 8,000 pages and if I make such an allowance then he has done all that he needs to satisfy me that the full allowance of 10,000 ages of PPE would be made out.

57. For the reasons which I have set out above, I do not think Mr. McCarthy's approach is the correct approach. In my judgment a 'page' in PDF does not count automatically as page for the PPE purposes.

58. Although I am satisfied that the consideration of this material was a substantial task in this case it is not at all clear that the Appellant did in fact consider they needed to undertake the task of checking the schedules served with the report of Mr. Anger, the analyst in this case. But even if they did check them, it could had been done in the way suggested by Mr. McCarthy, not painstakingly going through each document in PDF but over a matter of a few hours or so by dip- sampling or similar (in the way Mr. McCarthy indicated), in any event not over days.

59. Only to a limited extent would the Appellant be able to contextualise the raw material which did <u>not</u> directly involve the Defendant; and it is not suggested that instructions could be obtained on the detail of such material from the Defendant or indeed from any other party. As the attendance notes appear to reveal it was the material that concerned or potentially the Defendant which required the more detailed analysis. The entries potentially involving Defendant were limited. Even accepting that in general the nature of the enquiries and investigations undertaken were reasonable (this included identifying contact involving the 7092 number), such calls involving these numbers could be identified reliably in the manner I have suggested using Excel (indeed even in PDF using the 'find' function.)

60. It is in general the pattern of calls, their frequency/intensity, perhaps the length and when such calls were made which was importance in this case. In any event I agree with the

submission of LAA that this did not require consideration of the material in all the columns of the material from O2. Much of the material obviously not involving the Defendant had to be checked but I am not satisfied it did all require close consideration. As the Tables produced to me illustrate the material upon which phone numbers connected to the Defendant and upon which instructions could be taken was, largely or to any extent, concentrated in a limited number of the AMS exhibits/files.

61. It seems to me clear that to award over 8000 pages of PPE for consideration of the relevant disputed material would be substantially to overcompensate the Appellant (even allowing for the10,000 page cap). In the hearings I expressed some doubt as to whether the process of merely checking this material would justify it counting as PPE and that a Special Preparation Fee may be more appropriate, at least for much of the material. It seems to me that it might reasonably be suggested that a page count for PPE purposes could be ascertained after filtering out material that was obviously irrelevant or did not require any reasonably close consideration. Had that occurred I think it is likely that the PPE page count would be less than the LAA are proposing in this case.

62. The LAA have proposed as I understand it (if I have my maths correct) 2096 pages for ePPE in respect of the disputed material.

63. If I accept that the consideration of the material served from O2 is all to be treated as PPE, then I think LAA's approach is correct insofar as it recognises that much of material in the various columns report did not need to be considered closely and could easily be filtered out.

64. In respect of the Vodafone material it does seem that the use of A1 size was a product of the way the material was presented and this did not necessarily indicate that there was any significantly more work considering the 'page' than if it had been of A4 width. However, in any event and perhaps more significantly, the figure put by the LAA in respect of this material otherwise permitted full allowance for all the material. It appears to take little or no account of the ability to filter in Excel or use the 'find' function in PDF and the perhaps limited extent to which this material which contained information specifically referable to the numbers attributable either to the Defendant or to others numbers with whom he was said to have had contact and were of particular interest to the case against him.

65. I note in this context from the Tables produced by the Appellant that AMS 68- 71 appear to have contained little, if any material, in respect of calls and messages which called to be noted (the notation against the relevant numbers which were considered was 'NR' which appears to indicate that the search revealed no results). And yet on the LAA's approach over 800 pages are to be allowed, and on the Appellant's approach over 3000 pages should be allowed for consideration of this material. It seems to be clear, as I said in *Lawrence*, that it is for the Appellant to identity why material needed to be considered closely in circumstances such as here where the relevant data is likely to contain large amounts of irrelevant information or material that did not need to be considered closely.

66. To my mind the approach of 'sensible approximation' which was endorsed In *Leer & Meerbux* and is established as applying in respect of the Images sections of phone downloads, should apply here. It requires a view to be taken as to the proportion of material which did require close consideration. That requires some consideration of the nature and the work to be

done which I have undertaken with the benefit of Mr. McCarthy's submissions and having regard to the further material provided.

67. The approach suggested by the LAA has the merit of providing a reasonably clear scale for the evaluation of the ePPE. In the event applying the approach I have set out above, the figure proposed, if anything, and for the reasons set out above, risks overcompensating the Appellant. However in circumstances where there have been quite a number of hearings already I have decided to allow the disputed ePPE in the figure put by the LAA, being as I understand it 2096 pages in their final submissions. There was no attempt in these submissions to develop the suggestion that consideration of some of this material should be compensated by way of a Special Preparation Fee in circumstances where I might otherwise expected to this to have been done and, if that had been done, Mr. McCarthy might have been expected to want to reply to it. Both sides were content to leave things as they were on their earlier oral and written submissions.

68. I should say if I were wrong as a matter of law and it was appropriate to treat as a starting point each 'page' of PDF as a page for ePPE purposes, it must be right that there should, to my mind, a second stage consideration of the sort suggested by the LA. If, for the purposes counting the PPE, it were right to assume one 'page' of A1 were 8 pages of PPE, then it seems to me to be likely to follow that if the material were served in 8 A4 pages for each one 'page' of A1 it was likely to have consisted of many pages of irrelevant material or material that did not need to be considered closely. Thus, even if the correct approach were somewhat different from that which I have set out above, this would not have led to me to the making of a higher award. Having looked at the work reasonably required I am satisfied that there should be a substantial discount from the 'page' count in PDF to reflect the fact that the material was likely to have included material which was irrelevant or did not need to be considered closely.

COSTS JUDGE BROWN