

Post Lockdown survival: How to get the best out of Pages of Prosecution Evidence

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A. Introduction

- (1) Billing is a neglected area
- (2) Complex legislative framework governs costs in criminal proceedings
 - Criminal Legal Aid (Remuneration) Regulations 2013 S.I. 435
- (3) Criminal costs case decisions cited by Determining Officers in their Written Reasons

B. Factors which are important for PPE billing

- Criminal Legal Aid (Remuneration) Regulations 2013 S.I. No 435

Link: <https://www.legislation.gov.uk/ukSI/2013/435/contents/made>

- For electronic disc material to count towards PPE, 3 hurdles to overcome for a successful claim:
 - served by Prosecution (not Defence material)
 - used material – unused does not count towards PPE
 - treated as PPE by Determining Officer

C. Served material

- The onus is on you to prove service: *R v Griffiths* (2010) unreported
- Formal service by written NAE

- Split service – service on one defendant covers all defendants
- The LAA Crown Court Fees Guidance Appendix D is guidance only – not tramlines

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/813932/CCFG_-version_1.11_-_June_2019_.pdf

CCFG: List of items to be included in PPE count

- fullest committal bundle or set of served prosecution documents.
 - witness statements, interviews, documentary and pictorial exhibits
 - First Stage Streamlined Forensic Report (SFR1)
 - Transcripts of video evidence that the judge requests.
 - Scene of crime photographs.
 - Prosecution analysis carried out on phone data.
 - Bank statements.
 - 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 in order 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.
 - **Digital format = 'relevant circumstances'** such as:
 - the importance of the evidence to the case,
 - the amount and the nature of the work that was required to be done and
 - by whom,
 - the extent to which the electronic evidence featured in the case against the defendant

PPE Validation - CC Fees Guidance

In cases where the advocate or litigator is relying on the LAA Report from the DCS as evidence of PPE, the whole of the LAA Report must be provided where the LAA is made aware that the page count has already been assessed for that defendant or a co-defendant, and full details are given up front, the LAA will normally apply this assessment across schemes/ co-defendants.

The following additional information must be submitted for all claims where electronically served evidence is being claimed as PPE:

- The disc or discs/other electronic service media containing the material.
- The full prosecution list/s of all evidence served in the case.
- An explanation as to which of the electronically served exhibits are being claimed as PPE (i.e. for each exhibit listed, explain why you consider that the nature of this document and the relevant circumstances, specific to your client's case, mean that the Appropriate Officer should decide that it is appropriate to include this particular item of material within the PPE, and if so, how many additional pages are being claimed from the total page count within that exhibit).
- A Schedule in the following format justifying inclusion should be considered in all cases and may be required in cases involving high electronic evidence counts/multiple discs:
 - Disc A, Folder B, SubFolder C, Document D–....pages
 - Disc A, Folder E, Document F– Pages
 - Disc G, Folder H, Document J, Tab K (if a spreadsheet is claimed for)–pages

Additional justification:

- The prosecution case summary.
- The defence statement.
- Any defence schedules prepared from the electronic evidence.
- Any skeleton arguments submitted relevant to the electronic evidence claimed as PPE.
- Litigator's attendance notes.

- Full, detailed work logs or file notes showing all work undertaken in relation to the material served electronically.

D. Service of material ruling

- *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB)
- Ask trial judge, exercising case management powers to rule on service of material, to order service to benefit the efficient, effective and smooth running of proceedings (see eg CPR rules 1.1.(2)(e) and 3.2.(3))

- in the judgment of Mr. Justice Holroyde from SVS :

i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.

ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.

*iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, **or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served.** But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.*

iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispensed with the need for service of a notice of additional evidence before further evidence could be adduced, and all parties subsequently over- looked the need for the prosecution to serve the requisite notice ex post facto.

vi) *In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.*

- Trial judges view of service is persuasive not determinative as Cost Judges are not bound to follow trial judge's opinion:

R v Nutting [2013] 6 Costs Law Reports 1037

- Arguments in *Lord Chancellor v Hayes* [2017] EWHC 138:
 - Material was pivotal/core/integral to prosecution case.
 - Had to be considered in properly preparing defence case - Consideration required to check accuracy and veracity of prosecution schedules and section 10 admissions of fact.
 - Defence are entitled to refuse to agree admission of extracted data unless they are given opportunity to examine all the data on a download allowing defence to consider context of material

As Mr. Justice Holyrode stated in SVS [para.46]

'the key point is that if the prosecution do wish to rely on a sub-set of the data obtained from a particular source, it will often be necessary for all of the data from that source to be exhibited so that parts on which the prosecution rely can fairly be seen in their proper context'

E. Treated as PPE

- 3rd hurdle served used material should be treated as PPE as it is central to the case and requires proper consideration by the Defence.
- Consider relevant passages in:

- Prosecution Opening/case summary
- Judicial remarks during legal arguments, summing-up and sentence
- Note for Taxation
- Solicitor File Notes:
 - what work undertaken on the material
 - why that work was undertaken
 - what was learnt from the work
 - what followed
 - any resultant work product eg timeline, schedules

3 cases often cited by LAA re relevance:

1. *R v Sana* [2014] 6 Costs LR 1143:

- not reasonable to treat the irrelevant material as PPE. However, reasonable time spent considering the material could still be the subject of a claim under the special preparation rules.¹

- with the need to prove what actual work was undertaken ideally with contemporaneously kept worklogs to demonstrate time actually spent on the material

2. *R v Mahmood* (SCCO Ref 149/16;155/16 and 185/16):

In cases where a telephone report is served it may be appropriate to subdivide a report into its individual sections and allow only the relevant tabs or sections.

In particular, there is a distinction between “social material” i.e. audio files, images, photographs, internet history, cookies, installed applications etc that may properly be

¹ **AGFS and Special Preparation**

Under the AGFS, special preparation in respect of PPE is only payable when the PPE for a case goes beyond 10,000 pages, or 15,000 in drugs cases, or 30,000 in dishonesty cases. Electronic evidence can be assessed by way of special preparation as part of the additional evidence if the relevant PPE threshold for the case is exceeded.

remunerated as special preparation and telecommunications data i.e. contacts, call history, SMS and other messages which is more likely to be paid as PPE.

3. R v Robertson (SCCO Ref 22/17):

Personal photographs or images contained on a defendant's telephone are unlikely, per se, to merit inclusion within the pages of prosecution evidence.

Scott Schedules

Scott schedules helpful visually and narrow down the issues

Create a schedule of items:

- claimed by the Appellants
- allowed by the LAA Determining Officer
- disallowed by the LAA,
- reassessed by the LAA
- Appellants' reasons justifying relevance

Extract from SCOTT SCHEDULE

Download of Mobile Phone (pdf) –

Total pages 2,801 (57 allowed)

Section	Contents	Appellant's comments	Respondent's response
Summary [pp1-2]	This is general information about the extraction and device, including plug ins 2 pages	Not relevant	
Call log [pp10-31]	This section includes all the calls to and from the phone. There are 704 entries 22 pages	Relevant for purposes of seeing contact between device and co-defendants	• Phone 1of2: PDF: pages 10 to 39 = 30 PPE ALLOWED
Chats [pp32-33]	Log of chats 2 pages	Relevant for purposes of seeing chat content between device and co-defendants	ALLOWED
Contacts [pp34-40]	This is a record of all the saved contacts. 7 pages	Relevant for purposes of seeing if any contacts saved are co-defendants	ALLOWED
Cookies [pp40-244]	Record of all cookies stored on phone.	NOT ARGUED	DISALLOWED
Emails [pp244-629]	These are all the emails sent to/from the email account linked to the device. 875 entries, 48 deleted 386 pages	No emails appear to relate to offence	DISALLOWED
Installed applications [pp630-632]	This is a list of applications and games downloaded to/pre-installed on the phone e.g. Amazon 3 pages	Not relevant	DISALLOWED
MMS [pp633-635]	This is a record of media messages sent to and from the phone. There are 28 entries, 8 deleted 3 pages	Relevant for purposes of seeing if contact between device and co-defendants	ALLOWED
SMS [pp637-662]	Record of messages sent to and from phone. There are 737 entries, 248 deleted 26 pages	Relevant for purposes of seeing what if any contact between device and co-defendants	ALLOWED

F. Recent helpful Costs case law

- *R v King* SCCO 170/19 – electronic data mess

[12] In determining what was a reasonable course of action, the use of hindsight must be guarded against. Against a backdrop of electronic evidence which was served as used and phone handset reports which were not sub-divided into categories of data I consider it reasonable to ask how the solicitors could reasonably be expected to know which documents could reasonably be studied for the purposes of PPE and which only merited reading time for a claim for special preparation? By the time a litigator has considered each document, time has been spent reasonably on those documents which ultimately may appear to be less relevant with the benefit of hindsight than others. I also take into account that, on the evidence presented, the electronic data was not served in a readily searchable form.

*[13] I have considered the digital exhibits in question. There is no dispute that each of the three defendants' phones were served as used evidence. When the USB stick is opened, each digital phone exhibit is sub-divided into folders - one folder for the handset report and one folder for the sim card report. There is no further sub-division meaning that the phone handset report for the Defendant's phone, for example, is presented as a single 12,683 page document. **The page count is accurate, being in PDF format. The Notice of Additional Evidence sets out a page count of 14,073 which is based on the totality of the three phone handset reports and to the exclusion of the sim card reports. Given the length of the conspiracy, the reliance on establishing contact with both co-conspirators and victims, the fact of image data showing properties and/or building works, the basis of the prosecution case, and the manner in which the served used electronic evidence was provided being thousands of pages in PDF absent explanation or sub-division, I consider remuneration on the basis of PPE up to the 10,000 page cap to be appropriate.***

- *R v Mooney* SCCO 99/18 – if reasonable to view a category, then all items in category should count towards PPE

*'[14] It is agreed that it was reasonable for the solicitor to look at 129 pages of a total of 136 in a particular category of documents. **In determining what was a reasonable course of action, the use of hindsight has to be guarded against.** I ask, perhaps rhetorically, how the solicitors could reasonably be expected to know which documents*

could reasonably be studied for the purposes of PPE and which only merited reading time for a claim for special preparation? The artificiality of this situation is stark. **By the time a litigator (or counsel) has considered each document, time has been spent reasonably on those documents which ultimately appeared to be less relevant with the benefit of hindsight than others. In my judgment, the determining officer ought to take a rather broader approach to what has been allowed than has been demonstrated by the schedule before me.**

Where a category is clearly reasonable to view in principle, the correct approach ought to be to allow all of those entries. The same is true in this case, where 425 of 427 documents have been agreed.

It seems to me that if a category has been allowed in part then it would be an unusual case where it ought not to be allowed in full.

G. Page count calculation method

- Blank pages will not count
- If evidence served on both PDF and Excel formats, only one format will count towards PPE, not both, duplication will not be paid for: *Dauginitis* [2018]
- If only Excel format served then PPE should be calculated in reference to 'excel pages' not the PDF equivalent: *O'Rourke* [2017] SCCO 10/17,34/17,47/1.
- PDF is not the presumed basis, but have to justify Excel based calculation: *R v Ahmed* (SCCO Ref 182/19): 20.4.20 decision

<https://crimeline.co.uk/pdf-versus-excel-basis-for-page-count-calculation-in-ppe-disputes/>

- The decision in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB) cited in argument. **"The qualitative assessment commended by the High Court in that case does not lead to a presumption that a PDF report should be favoured over an Excel report. On a case by case basis, it falls to the Determining Officer, or Costs Judge on appeal, to consider which report best reflects the page count on an equivalent paper basis."**

- The Costs Judge in *Ahmed* accepted the proposition that:

“when faced with data presented in PDF and Excel format that it will not always be the case that the PDF format is favoured for the purposes of a page count. However, the use of the Excel format for a page count must be justified and in keeping with the spirit of the regulations.”

- There was no dispute that Excel lends itself to greater functionality for the purposes of analysis when compared with PDF. ***“However, one must recall that the regulations simply provide mechanisms for remuneration. A litigator, or indeed advocate, is not compelled to submit a claim for remuneration based on PPE. It is open to them to submit a claim in special preparation or indeed a combination of PPE and special preparation.”*** Special preparation claims are not limited to work in excess of the 10,000 PPE limit. ***“Simply because documents were considered in Excel it does not mean that remuneration based on an Excel page count will automatically follow.”***
- Whilst the Costs Judge in *Ahmed* considered there to be merit in using the PDF version to arrive at an accurate page count for the purposes of calculating remuneration, that presumes that the PDF version of a document is legible. Where pages had to be enlarged to be legible the PPE count would increase. The Costs Judge acknowledged that ***“whilst in the vast majority of cases the PDF version will provide an accurate reflection of what would otherwise be a printed page count for remuneration purposes under the regulations, it will not always produce an accurate page count. Clearly adjustments have to be made where such instances arise.”***
 - ***Eg in Ahmed small font size text made the PDF illegible***

H. Appeal process in Senior Courts Costs Office cases

- Request Written Reasons
- 21 day time limit after WR to lodge appeal
- Court issue fee of £100

- Electronic lodging with HMCTS e-filing service mandatory for proceedings after 20.1.20

<https://efile.cefile-app.com> <https://efile.cefile-app.com>.

<https://www.gov.uk/guidance/ce-file-system-information-and-support-advice>.

- Appeal on paper, telephone or in person
- Settlement to increase PPE, include request for Appeal Costs
- Be realistic – write out grounds explaining why the material is relevant.