Update on Contentious Issues in Costs Claims

Alexandra Healy QC – July 2014

Electronic Evidence – Claimed as PPE or Special Prep?

Criminal Legal Aid (Remuneration) Regulations 2013, Sch 1 para 1(3)-(6)

(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*.**

(6) In proceedings on indictment in the Crown Court initiated otherwise than by committal for trial, the appropriate officer must determine the number of pages of prosecution evidence in accordance with subparagraphs (2) to (5) or as nearly in accordance with those sub-paragraphs as possible as the nature of the case permits.

LAA Guidance June 2014

Appendix D – "it is intended that where the prosecution serve such a digital document, which has never existed in paper form, the appropriate officer will assess whether this would previously have been served in digital form or printed out. If the former, then the special preparation provisions will apply. If the latter, then the number of pages that would have resulted will be added to the PPE"

Clear that where the evidence would previously have been served in paper format it should be counted as PPE

R v Jackson - 2013 SCCO 36/13

Held that telephone evidence served electronically would formerly have been served in paper format. Indeed the costs judge inferred that in some cases such evidence is still served in paper format, as the standard form of the officer's statement concluded with alternative production of the exhibit either as a CD-R data disk or printed a copy of the data.

R v Smith – 14 October 2013, SCCO 146/13

Held that the telephone billing evidence served on disc would previously have been served in paper format and, as such, it should be included in the PPE count.

However – whilst this principle is clear on the authorities, the LAA appear regularly to refuse to accept that telephone billing evidence should be included in the PPE count. It is understood that of those cases currently awaiting written reasons approximately 50% relate to cases in which the LAA has refused to pay electronic evidence as PPE.

But the classification of electronic evidence as PPE is not restricted to those cases where evidence would previously have been served in paper format

R v Lee - 26 February 2014, SCCO 343/13

Sniper evidence (satellite readings of tracker devices) and handset reports – regulations do not say that the determining officer must base his or her decision solely on whether the evidence would previously have been served in paper format – the Determining Officers must base his or her decision "*taking account the nature of the document and any other*

relevant circumstances." In that case satisfied that the sniper evidence and the handset evidence was vital to the prosecution case and was substantially relied upon by the prosecution and therefore should be included in the pages of prosecution evidence.

If the trial judge is prepared to express a view about the significance of the electronic evidence, whilst not determinative, such view should be given "considerable weight" in determining the "nature of the document and any other relevant circumstances."

R v Wortley & Handley, 19 March 2014, SCCO 06/14

Telephone data served on disc – note from trial judge referred to prosecution having "relied to a very significant extent" on the telephone evidence and ordered the CPS to formally recognise the pages on the disc be included in the page count.

"The trial judge has no authority to bind the Determining Officer, but there is no doubt that considerable weight must be given to his views."

R v Jalibaghodelehzi, 2 April 2014, SCCO 354/13

Downloads from mobile phones – held that this was the sort of evidence which would previously have been served in paper format. Following the Agency's own guidance it should have been included in the page count.

"11. While that is enough to decide this appeal in the solicitor's 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."

R v Valton, 14 April 2014, SCCO 32/14

Disc of raw telephone data and schedules – determining officer had refused solicitors claim for inclusion in PPE despite reference to R v Jackson, asserting that the LAA "do not believe that any costs judge's decisions warrant a change to the LAA's process or the published guidance." Solicitor produced evidence that in another case in which he had acted the same type of evidence had been served in paper form. Costs judge held that having considered the content of the documentation and the fact that it was crucial to the prosecution case that the electronic data should be included as PPE. Moreover solicitor had established that in relation to its own guidance the content would previously have been served in paper format.

The position, however, is not the same for the CPS.

CPS Scheme C

Electronic Material

74. Evidential material which is produced and served in an electronic format, such as images from a computer copied to disc or documents scanned on to disc, should be dealt with as follows:

    a. Witness statements and records of defendant interviews formally served in evidence will always be counted as pages. If paper pages of exhibits are scanned and produced on disc for convenience, they should be counted as pages for the purpose of remunerating the advocate;

    b. If, however, electronic media material, such as telephone data and billing, a copy of a computer hard drive or a CCTV recording, is served on disc, the advocate is paid for any reasonable time spent viewing the material at the appropriate GFS hourly rate. The advocate must provide detailed work records of all work undertaken in the case highlighting that work which relates solely to the review of electronic material.

    Material that does not qualify as a page under paragraph 74(a) can never be treated as a page even if it is subsequently printed off in to paper format.

However, any page that is printed directly from a disc and copied for use by a jury during an effective trial will be added to the page count subject to the principle that the same page will only be counted once.

75. If the advocate is to be paid 'pages' because the material served on disc falls in to category 74(a) above, the advocate will not be paid viewing time in addition for consideration of that material on disc.

76. Payment will only be made for viewing 'evidence' on disc. No payment will be made for time spent viewing 'unused' electronic material.

RETRIALS

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

Schedule 1

Paragraph 2

"(2) Sub-paragraphs (3) and (4) apply **where, following a trial, an order is made for a new trial and the same trial advocate appears at both trials** where –

(a) The defendant is an assisted person at both trials; or
(b) The defendant is an assisted person at the new trial only; or
(c) The new trial is a cracked trial or guilty plea.

(3) Subject to sub-paragraph (4), in respect of a new trial, or if the trial advocate so elects, in respect of the first trial, the graduated fee payable to the trial advocate must be calculated in accordance with Part 2 or Part 3, as appropriate, except that the fee must be reduced by –

(a) 30%, where the new trial started within one month of the conclusion of the first trial;

(b) 20%, where the new trial did not start within one month of the conclusion of the first trial;

(c) 40%, where the new trial becomes a cracked trial or guilty plea within one month of the conclusion of the first trial; or

(d) 25%, where the new trial becomes a cracked trial or guilty plea more than one month after the conclusion of the first trial.

LAA GUIDANCE – June 2014

Retrials

17. If there is no order by the judge that there will be a new trial and the new trial is deemed to be part of the same trial process, then the fee payable is for one trial only. Refer to Costs Judge decision: **CJD11: R. v. Nettleton (Mr Doran) (2012)** which held that despite there being a gap of more than one day after the first jury was discharged, this case should be paid as one trial because it was all part of the same trial process and no further preparatory work was required before the case recommenced. Also refer to Costs Judge decision: **CJD12: R. v Cato (2012)** which

held that the length of the delay does not necessarily mean there has been a retrial. For a retrial to take place the trial must have run its course and an order for retrial must be made. In **CJD13: R. v Forsyth (2010)** it was held that in order for a trial to be considered a retrial there must be an order for a new trial or the trial must have run its course without the jury reaching its verdict.

18. In addition, refer to the additional retrials guidance at **Appendix P** which provides detail on how to claim for cases where, despite the court not making a formal order for a retrial, the circumstances suggest there is trial plus a new trial/retrial.

Appendix P

Trial / New Trial

The decision about whether there is a single trial or a trial followed by a new trial in any case will depend entirely on the facts of that particular case. There are many different variables that must be considered when reaching a decision. Given this, providing absolute clarity is difficult. The purpose of this section of the guidance is to set out the variables that must be taken into account when making a determination in this area. This guidance applies to both litigator and advocate fee claims.

The single most important factor is whether or not the trial judge makes an order for a new trial (as opposed to an order that the trial re-start or be re-listed).

Where an Order is Made for a New Trial

Advocates:

If there is an order for a new trial and the same advocate represents the defendant in both the first trial and new trial then the fee payable is a graduated fee for the first trial (or new trial if the advocate elects) and a reduced rate for the new (or first) trial depending on when the new trial commenced (Paragraph 2(2) and (3), Schedule 1, of the Criminal Legal Aid (Remuneration) Regulations 2013).

If there is an order by the judge for a new trial and a different advocate represents the defendant then paragraph 2 (5) and (6), Schedule 1, of the Criminal Legal Aid (Remuneration) Regulations 2013 applies and a graduated fee is payable to each advocate.

Litigators:

Where an order is made for a retrial and the same litigator acts for the defendant at both trials the fee payable to that litigator is a graduated fee for the trial and 25% of the fee as appropriate to the circumstances of the retrial.

If there is an order for a retrial and the case is transferred to a new litigator then each litigator is paid a proportion of the graduated fee.

Where an Order is Not Made for a New Trial

It is acknowledged by all stakeholders that an order for a new trial is rarely made, and all other relevant factors must be taken into account when making a determination. In cases where there is no order made by the judge, then the LAA will apply the reasoning in Costs Judge decision: **CJD11: R. v. Nettleton (Mr Doran) (2012).** In this case, Master Gordon-Saker held that if there is no order by the judge that there will be a new trial and the second leg of the case is deemed to be part of the 'same temporal and procedural matrix', then the fee payable is for one trial only. In Nettleton, despite the fact that there was a gap of two working days after the first jury was discharged, Master Gordon-Saker ruled that the case should be paid as one trial because it was part of the same trial process.

In determining whether a case forms part of the same "procedural and temporal matrix", the LAA will consider the factors set out below:

- The length of time between the first leg and the second leg of the case. A gap of just a few days may, for example, indicate a single trial, whereas a gap of several months may indicate a trial followed by a new trial. Although the LAA will consider the length of gap in light of Costs Judge decision **CJD12: R. v Cato (2012)** which held that where there is no order for a new trial the length of the delay does not necessarily mean there has been a new trial. The trial must have run its course (i.e. the jury must have gone out to consider its verdict) and an order for retrial must be made.

- The stage at which the first leg concluded. If the trial concludes and the jury is unable to reach a verdict, any further trial will be considered as a new trial. Conversely, if the jury is discharged before all evidence has been heard, and the proceedings continue, it is more likely that this will be considered a single trial. **CJD13: R. v Forsyth (2010)** held that in order for a trial to be considered a trial and new trial, the trial must have run its course (i.e. jury failed to reach a verdict) and there must be an order for a new trial and not merely a break (whether or not a second jury was empanelled).

- The relative length of the first and second legs. A very short first leg followed by a much longer second leg may indicate that this was one trial.

- A change of advocate between the first and second legs may be an indicator that there has been a trial followed by a new trial, depending on the reason for the same advocate not attending both legs.

- A change of judge between the first leg and the second leg may be an indicator that there has been a trial followed by a new trial. Where the first judge has heard substantial legal argument which needs to be argued again before a second judge, it may indicate a trial followed by a new trial, whereas a change in

judge early in the trial, for example because of illness or for administrative convenience, is more likely to indicate a continuing process.

- A change in the case between first and second trial (e.g. a change in indictment, a change in way case is presented, etc.). A substantial change in the nature of the case may lead to a determination that there was a trial followed by a new trial.

- Any comments by the trial judge in either the first or second trial to indicate there was a new trial.

Cases

R v Gussman, 6 September 1999, SCCO 040/99

26/10/98 – listed for trial, jury sworn – jury discharged in afternoon

27/10/98 – trial commenced - verdict on 30/10/98

Appeal against refusal of determining officer to treat the 26/10 as part of the trial – allowed following submissions on behalf of the Lord Chancellor that if a jury is sworn but then discharged on the same day with a new jury being sworn the following day there is sufficient continuity to conclude that the trial did in fact proceed.

R v Khan (Zulfi Al) [2005] 1 Costs LR 157 (SCCO 216/03)"

Day 1 – jury sworn midday – then discharged shortly after as one found case too distressing

Case adjourned for 4 days to allow new jury to be sworn following Monday

Following Monday – trial proceeded – lasted 17 days before prosecution offered no evidence.

Determining officer classified this as two trials and reduced the 2nd trial by 40% as a retrial.

Only reason jury was not sworn the next day was through trouble with an interpreter and finding a jury panel – no fault of def that did not proceed the following day.

Held this was not a case of a retrial properly so called and therefore the 40% reduction should not have been applied,

R v Seivwright , 16/7/10, [2011] 2 Costs LR 327 (SCCO 75/10) –

21/9/09 – trial commenced (Monday)

24/9/09 – jury discharged (Thursday)

25/9/09 - (Friday) listed for mention - it was agreed the 'Retrial' would commence the following Monday.

28/9/09 – second jury sworn

Held that paragraph 10(1) applies only where

- The retrial follows a trial ***and***
- an order has been made for a retrial.

"15. It seems to me that the order for a retrial, as envisaged by the Funding Order, would be an order following appeal or an order where a jury has failed to reach a verdict.

16. Further, in my judgement, a 'retrial' means a *new* trial which is not part of the same procedural and temporal matrix as the first trial. As in *Gussman* and in *Khan* the hearing which began on the 28th September was part of the same procedural and temporal episode as the hearing which began the previous Monday. This was a 6 week trial. To separate the hearing which began on 21st September from that which began on 28th September would seem unduly artificial."

R v Forsyth, 19/10/10 (155/10) – LGFS

4/1/10 – trial commenced

5/1/10 – jury discharged

6/1/10 – second jury sworn and trial recommenced

12/1/10 (5th day of recommenced trial) - juror diagnosed with cancer – 2nd jury discharged

18/1/10 – third jury sworn – trial concluded on 11/2/10.

Solicitors claimed 1st trial from 4/1 – 12/1 was a trial and claimed trial from 18/1/10-11/2/10 was a retrial for which they claimed a separate fee.

Held that the provision "is aimed at cases such as those where an order for retrial has been made following appeal or where a jury has failed to reach a verdict or where the prosecution obtains an order under s.76 Criminal Justice Act 2003. These

are cases where the order for a retrial will cause some more preparation work to be done."

"24 In this case the gap between the discharge of the second jury and the empanelment of the third was 3 working days, on one day of which there was legal argument about disclosure. So in essence there was a 2 day stutter in the trial process. I accept that the empanelment of the third jury could not have happened without some direction from the judge. But to my mind such direction is not "an order…for a retrial." This was not a retrial. It was a continuation of the trial with a different jury after a short break."

R v Cato, 9 March 2012 SCCO, 155/11 - LGFS

LGFS - applicant argued it was an 8 day trial, LAA argued 3 day trial, then 5 day retrial to which reduction applied.

14/6/10 – trial commenced, abandoned on 3rd day due to problem with evidence given by victim

27/9/10 – trial takes place, concludes on 4/10/10.

Held that the original trial did not "run its course" leading to the discharge of the jury and an order for a re-trial. No order was needed for a re-trial because a fresh jury could be empanelled simply as a logical consequence of the discharge of the original panel during the June trial. …."In so far as it is necessary for me to do so, I would hold that this is a situation which is not "normal" and that it does not follow that because there has been a long gap, the September hearing must have been a re-trial.

R v Nettleton (Mr Doran) [2013] 1 Costs LR 186 – AGFS

1/11/10 – trial started

4/11/10 – jury discharged when became apparent a juror had a connection with case

8/11/10 – trial listed to re-start

9/11/10 – 2nd jury sworn and trial continued until 16/11/10.

Costs judge held this was one trial as no order was made for a new trial and that the trial that started on the 8/11/10 was part of the same process that started on 1/11/10.

R v Nettleton, Johnson, Graham, Lee 28/2/14, SCCO 58/13

1/11/10 – trial started no jury sworn but J stated this is the 1st day of trial.

2/11/10 – jury sworn

4/11/10 - jury discharged when it became apparent a juror had a connection with the case.

8/11/10- trial listed,

9/11/10 –2nd jury sworn & trial continued

16/11/10 – jury discharged following arrest of trial judge.

7/3/11 – listed before new trial judge – no jury sworn

9/3/11 – 3rd jury sworn & discharged

10/3/11 – new jury brought into court & asked questions but not sworn

14/3/11 – trial proceeds until 23/5/11.

Held that 1st trial was from 1/11/10-16/11/10 and a retrial from 7/3/11 – 23/5/11.

"39. …the fact that a trial commences but is not concluded on consecutive court days because, for example, the jury is discharged, does not mean that it cannot be "a trial". On the contrary, even if there is a long gap between the end of the first stage and the resumption (as was the case in *R v Cato*) that can still constitute a trial if it is a continuous process. …there would not be a new trial if, on resumption, matters were part of the same procedural and temporal matrix as the first trial so that there was only one process."

46 "…Where, as here, the applicable parts of the Regulations to which the Court must have regard, do not provide a definition of "trial", it is likely that each case will be fact sensitive. This one certainly is; it may well be, both with regard to the appeals

in point and for the future, unique that the trial collapsed because the judge herself was placed under arrest. In my judgement, that factor itself, was sufficient to alter the temporal and procedural matrix. In the first place, I would hold and agree with Master Gordon-Saker that there was one trial before Her Honour Judge Bolton for the reasons he gave in *R v Nettleton*. Second, I consider that there must have been a re-trial because the original judge was unable to complete the case. This was not a situation such as that which occurred in *R v Cato* where it was possible, expressed colloquially, to say "we will pick up from where we left off because the first trial did not run its course." On the contrary, that could not be the position here because from March 2011, the trial was taking place before a different Judge who had not listened to the many days of argument and evidence that Her Honour Judge Bolton had heard four months earlier. Thus, it was not a case of picking up from the position reached on the last occasion as part of a continuous process, but, on the contrary, was one of starting again with a new Judge, new jury and for some, new counsel. When that factor is added to the temporal position, specifically that resumption was nearly four months after the proceedings before Her Honour Judge Bolton had concluded, I am satisfied that the LSC is mistaken in its view that there was one trial in this case."

…

48 "…I do not agree … that the mere fact that the Crown served additional evidence and relied on a new witness, meant that the March trial *must* have been a re-trial. I would not go so far as to say that such an eventuality could never be sufficient to alter the procedural and temporal matrix but on the facts here, I do not agree with him."

NB – 1st trial had not 'run its course' nor had there been an order for a new trial