IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2006] EWHC 3669 (QB)

Case No.QB/2006/APP/0477

Royal Courts of Justice
Monday, 13th November 2006

Before:

MR. JUSTICE WALKER

(**Sitting with Assessors**)

B E T W E E N :

JONATHAN GOODMAN
PHILIP FARR — Appellants

- and -

THE SECRETARY OF STATE
FOR CONSTITUTIONAL AFFAIRS — Respondent

---

*Transcribed by **BEVERLEY F NUNNERY & CO***
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

THE APPELLANTS appeared in Person.

MR. V. SACHDEVA (instructed by the Treasury Solicitors) appeared on behalf of the Respondent.

J U D G M E N T S

(As approved by the Judge)

MR. JUSTICE WALKER:

1 The graduated fees scheme now in force under the Access to Justice Act 1999 contains provisions for the determination of defence advocates' fees. Such provisions are found in the Criminal Defence (Funding) Order 2001 No.855 as amended ("the Funding Order"). By Article 5 of that order remuneration in respect of relevant proceedings is to be in accordance with the provisions of Schedules I to IV. In Schedule I provision is made for the determination of costs by an appropriate officer and for a fee order and such determinations to a costs judge. By para.22(3), where a costs judge certifies a matter of general importance an appeal lies to the High Court against the decision of the costs judge.

2 This is an appeal under para.22(3) of schedule I. The appellants, Messrs. Jonathan Goodman and Philip Farr, appeal against the decisions of Master Rogers dated 24 May 2006 rejecting their appeal from the decision of the appropriate officer. The case concerns the proper construction of para.1(2) of Schedule IV to the Funding Order. That sub-paragraph states as follows:

> "For the purposes of this Schedule the number of pages of prosecution evidence shall include all witness statements, documentary and pictorial exhibits and records of interview with the assisted person and with other defendants forming part of the committal documents or served prosecution documents or included in any notice of additional evidence."

3 The question before Master Rogers was whether DVDs and inlays referred to in a prosecution evidence schedule constituted "pages of prosecution evidence … forming part of the committal documents or served prosecution documents". The appellants say that they do. The respondent denies that these particular DVDs or inlays properly fall within that definition.

4 For the purpose of this appeal, Master Rogers identified four questions which, taken together, comprised a principle of general public importance. These were as follows.

> "1. Whether the words of Paragraph 2 of section 1 of Part 1 of Schedule 4 of the Criminal Defence Service (Funding) Order as amended are to be strictly interpreted and therefore applied in a mechanistic and formulaic way with remuneration based solely upon a calculation of material forming 'prosecution evidence' [as defined therein].

> 2. If not to be so interpreted, whether to the detriment or benefit of counsel, A) What discretion is afforded to a Determining Officer, B) What is the basis for such discretion and C) Where is such discretion to be found in the Regulations.
>
> 3. Is counsel required to confirm that each and every 'page' of evidence has been fully read/scrutinised as part of the graduated fee payment scheme, if so what procedure should be adopted to confirm such and where is this requirement to be found in the Regulations?
>
> 4. Are DVDs and 'photo' inlays properly to be construed under the Regulations as pictorial exhibits when served by and relied upon by the prosecution? If not, what status do they have within the graduated fee scheme?"

5 When hearing argument today, I had with me two assessors, Master Campbell and Mr. Simon Brown. The appeal has been argued by Mr. Goodman for the appellants. I was much assisted by a skeleton argument prepared by Mr. Vikram Sachdeva on behalf of the respondent Secretary of State for Constitutional Affairs. In the event, I did not find it necessary to call on Mr. Sachdeva for oral argument.

FACTUAL BACKGROUND AND HISTORY OF PROCEEDINGS:

6 A helpful account of the factual background was provided in the respondent's skeleton argument and, after certain factual inaccuracies were corrected, this section of my judgment draws heavily on that account.

7 Mr. Goodman, as leading junior, and Mr. Farr, as led junior, represented Mr. Sidney Eric Austin under a representation order dated 21 October 2003, which was amended on 29 April 2004 to authorise the instruction of two junior counsel. The defendant was sent to Snaresbrook Crown Court on 28 November 2003 with a co-defendant, Mr. Simm, and was charged with one count of conspiracy to defraud at common law. The particulars of offence stated as follows:

> "Dino Simm (aka Peter Leigh) and Sidney Eric Austin on divers days between the first day of January 2002 and fifth day of July 2003 conspired together and with persons known and unknown to defraud such persons who have an interest in motion picture films by manufacturing, importing and selling infringing copies of films."

8 The prosecution alleged that the defendants supplied approximately 400,000 DVDs and made gross profits in excess of £2.5 million during an 18 month period. Mr. Simm was alleged to be the prime mover; Mr. Austin was said to be a full partner and shared equally in the profits. Mr. Austin pleaded not guilty to the indictment and following a ten day trial was convicted and received a sentence of four years imprisonment. His co-defendant, Mr. Simm, pleaded guilty to a variety of charges, including conspiracy to defraud, and received a sentence of three years imprisonment. Each defendant also received a confiscation order under the Proceeds of Crime Act 2002.

9 Both counsel submitted claims for payment under the graduated fees scheme. Mr. Goodman claimed some £404,724.01, including VAT; Mr. Farr sought £269,745.76, including VAT. The sum due to counsel for a trial not exceeding ten days is given by a formula which I shall set out in the section of this judgment dealing with relevant legislation. The vast majority of each claim comprised evidence uplift of some £394,054.39 for Mr. Goodman and some £262,702.92 for Mr. Farr, both figures including VAT. The evidence uplift was based on a rate per page of £1.86 and £1.24 respectively, with the number of pages claimed as 180,304.

10 Such a claim could not now be made, for the regulation has been amended so that the maximum number of pages has been limited to 10,000 from 2 August 2004. There was no limit at the relevant time for the purposes of these claims.

11 Counsel submitted an evidence schedule produced by the prosecution listing 1,038 numbered pages. They reached the figure of 180,304 by adding to the 1,038 pages and other pages of documents served during the course of the trial each of 51,615 DVDs as an individual page and each of the inlays which were documents designed to go inside the DVD cases amounting to 122,205, again each of them as an individual page.

12 It is common ground that the prosecution did not go to the expense of taking photographs of the DVDs and inlays nor of copying any such photographs so as to serve such copies on the defence.

13 The defence were sent three lever arch files with the 1,038 numbered pages of evidence. Mr. Farr, as junior defence counsel, attended a depot where the DVDs and other exhibits were stored. He was allowed to take a handful of DVDs. He saw the inlays. He did not, however, view the DVDs in the sense of watching the relevant motion pictures.

14 The determining officer allowed a total of 1,956 pages of prosecution evidence, this being the figure given by the court clerk at the end of the trial.

The result was that for a ten day Mr. Goodman received £13,798.84 and Mr. Farr £9,168.62, both figures including VAT. Counsel made an application for re-determination under para.20 of Schedule I of the Funding Order and submitted in support a letter dated 5 May 2005 from prosecution counsel, Mr. D. Groom, which stated that the DVDs and inlays referred to in the exhibits schedule were served on the defence as used material. However, the determining officer maintained her original decision giving reasons on 20 December 2005.

15 Counsel appealed to Master Rogers who was due to hear the appeals on 30 March 2006. However, the Master adjourned the hearing and invited the Lord Chancellor to submit representations on the appeal pursuant to para.21(6) of Schedule I to the Funding Order. Those representations were duly submitted on 11 April 2006. Counsel responded to them on 2 May 2006. On 24 May 2006 Master Rogers dismissed the appeal.

RELEVANT LEGISLATIVE PROVISIONS:

16 Provisions for the graduated fees are found in Schedule IV to the Funding Order. I set out below passages from Parts I and II dealing the general matters and the calculation of the graduated fee. I also set out matters from Schedule IV, Part IV, which is headed "Fixed and Hourly Fees". It is apparent from Part IV that there are circumstances where additional matters may be claimed for over and above the graduated fee calculated according to the formula.

> "1(1) In this Schedule:
>
> 'trial advocate' means a person instructed in account with a representation order to represent the assisted person at the main hearing in any case [including a Queen's Counsel or a leading junior counsel so instructed after the hearing at which pleas are taken];
>
> 'case' means proceedings in the Crown Court against any one assisted person:
>
> (a) on one or more counts of a single indictment;
>
> (b) arising out of a single notice of appeal against conviction or sentence, or a single committal for sentence, whether on one or more charges; or

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

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

'cracked trial' and 'guilty plea' have the meaning given in paragraph 9(3), (4) and (5) of this Schedule;

'main hearing' means:

(a) in relation to a case which goes to trial, the trial;

(b) in relation to a guilty plea …, the hearing at which pleas are taken or, where there is more than one such hearing, the last such hearing;

[(bb) in relation to a cracked trial, the hearing at which –

(i) the case becomes a cracked trial by meeting the conditions in paragraph 9(3) or (4), whether or not any pleas were taken at that hearing; or

(ii) a formal verdict of not guilty was entered as a result of the prosecution offering no evidence under the administrative procedure, whether or not the parties were required by the court to attend the hearing;]

(c) in relation to an appeal against conviction or sentence, the hearing of the appeal;

(d) in relation to proceedings arising out of a committal for sentence, the sentencing hearing; and

(e) in relation to proceedings arising out of an alleged breach of an order of the Crown Court, the final hearing;

'Newton Hearing' means a hearing at which evidence is heard for the purpose of determining the sentence of a convicted person in accordance with the principles of *R v Newton* (1982) 77 Cr App R 13;

'preparation' means work of any of the following types when done by a trial advocate:

(a) reading the papers in the case;

(b) …

(c) contact with prosecution representatives;

(d) written or oral advice on plea;

(e) researching the law, preparation for examination of witnesses and preparation of oral submissions for the main hearing;

(f) viewing exhibits or undisclosed material at police stations;

(g) …

(h) written advice on evidence;

(i) written and oral advice on appeal (where covered under the same representation order as the main hearing);

(j) preparation of written submissions, notices or other documents for use at the main hearing; and

(k) views.

(2) For the purpose of this Schedule, the number of pages of prosecution evidence shall include all witness statements, documentary and pictorial exhibits and records of interview with the assisted person and with other defendants forming part of the committal [of served prosecution] documents or included in any notice of additional evidence.

(3) In the case of proceedings on indictment in the Crown Court initiated otherwise than by committal for trial, the appropriate officer shall determine the number of pages of prosecution evidence as nearly in accordance with the preceding sub-paragraph as the nature of the case permits.

7.-(1) The amount of the graduated fee for a single trial advocate representing one assisted person being tried on one indictment in the Crown Court shall be calculated according to the following formula:

$$G = B + (d \times D) + (e \times E) + (w \times W) + (d \times R).$$

(2) In the formula in sub-paragraph (1):

G is the amount of the graduated fee;
B is the basic fee specified in paragraph 8 as appropriate to the offence for which the assisted person is tried and the category of trial advocated instructed;
d is the number of days or parts of a day by which the trial exceeds one day;
e is the number of pages of prosecution evidence excluding the first 50;
w is the number of prosecution witnesses excluding the first 10;
D is the length of trial uplifts specified in paragraph 8 as appropriate to the offence for which the assisted person is tried and the category of trial advocate instructed;
E is the evidence uplift specified in paragraph as appropriate to the offence for which the assisted person is tried and the category of trial advocate instructed;
W is the witness uplift specified in paragraph 8 as appropriate to the offence for which the assisted person is tried and the category of trial advocate instructed;
R is the refresher specified in paragraph 8 as appropriate to the offence for which the assisted person is tried and the category of trial advocate instructed.

18(1) A wasted preparation fee may be claimed where a trial advocate instructed in any case to which this paragraph applies is prevented from representing the assisted person in the main hearing by any of the following circumstances.

(a) the trial advocate is instructed to appear in other proceedings at the same time as the main hearing in the case and has been unable to secure a change of date for either the main hearing or the other proceedings;

(b) the date fixed for the main hearing is changed by the court despite the trial advocate's objection;

(c) the trial advocate has withdrawn from the case with the leave of the court because of his professional code of conduct or to avoid embarrassment in the exercise of his profession;

(d) the trial advocate has been dismissed by his client;

(e) the trial advocate is obliged to attend at any place by reason of a judicial office held by him or other public duty.

(2) This paragraph applies to every case on indictment to which this Schedule applies provided that:

(a) the case goes to trial, and the trial lasts for five days or more; or

(b) the case is a cracked trial, and the number of pages of prosecution evidence exceeds 150.

19(1) The hourly fee set out in the Table following paragraph 22 as appropriate to the category of trial advocate [and length of the trial] shall be payable in respect of work of the following types, provided that the trial advocate satisfies the appropriate officer that the work was reasonably necessary, namely:

(a) attendance by the trial advocate at conferences with prospective or actual expert witnesses; or

[(aa) attendance by the trial advocate at one view per case for up to one hour (exclusive of travelling time); or]

(b) travel for the purpose of attending (a view, or) a conference with the assisted person, where the appropriate officer is satisfied that the assisted person was unable or could not reasonably have been expected to attend a conference at the trial advocate's office or chambers; [or

(c) attendance by the trial advocate at pre-trial conferences with the assisted person not held at court, provided that such conferences do not exceed the number and length set out in sub-paragraph (1A);]

and where that fee is allowed the trial advocate shall also be paid the reasonable expenses of travelling and from the conference.

[(1A) The number and length of conferences for which the hourly fee set out in sub-paragraph (1) above shall be payable is as follows:

(a) for trials that do not exceed 10 days, cracked trials where it was accepted by the court at the pleas and directions hearing [or plea and

case management hearing] that the trial would not exceed 10 days and any guilty pleas, one conference not exceeding 2 hours;

(b) for trials lasting not less than 11 and not more than 15 days [and cracked trials where it was accepted by the court at the pleas and directions hearing or the plea and case management hearing that the trial would last not less than 11 days and not more than 15 days], two conferences each not exceeding 2 hours;

(c) for trials lasting not less than 16 and not more than 20 days [and cracked trials where it was accepted by the court at the pleas and directions hearing or the plea and case management hearing that the trial would last not less than 16 days and not more than 20 days], 3 conferences each not exceeding 2 hours; …

(d) for trials lasting not less than 21 and not more than 25 days [and cracked trials where it was accepted by the court at the pleas and directions hearing or the plea and case management hearing that the trial would last not less than 21 days and not more than 25 days], 4 conferences each not exceeding 2 hours];

(e) for trials lasting not less than 26 days and not more than 35 days [and cracked trials where it was accepted by the court at the pleas and directions hearing or the plea and case management hearing that the trial would last not less than 26 days and not more than 35 days), 5 conferences each not exceeding 2 hours;

(f) for trials lasting not less than 36 days and not more than 40 days [and cracked trials where it was accepted by the court at the pleas and directions hearing or the plea and case management hearing that the trial would last not less than 36 days and not more than 40 days], 6 conferences each not exceeding 2 hours;

(g) for trials lasting not less than 26 days and not more than 35 days, where the Commission has made an election under article 9A to apply this Schedule, 5 conferences each not exceeding 2 hours; and

(h) for trials lasting not less than 36 days, where the Commission has made an election under article 9A to apply this Schedule, 6 conferences each not exceeding 2 hours].

(2) In any case on indictment, a trial advocate shall be entitled to a fee in accordance with the Table following paragraph 22 for the

number of periods or parts of a period of 10 minutes of running time of any disc, tape or video cassette or part thereof which he listens to or views as part of the evidence in the case."

ARGUMENT:

17 The argument for the appellants has been essentially consistent throughout. It was concisely and forcefully formulated in the appellants' grounds for objection to the re-determination of costs. I quote from para.1:

> "There is no further definition within the wording of scheme as to what constitutes a 'page'. It is submitted that the DVDs served on the defence by the prosecution can properly, on a common sense interpretation, be classed as 'pictorial exhibits' and are therefore properly counted as 'pages] within the scheme. The prosecution relied, *inter alia*, upon the writing inscribed upon each DVD and lack of a pictorial 'classification mark' to support the contention that they were unauthorised copies.
>
> Certainly, the thousands of inlays served, which accompanied the DVDs and which were effectively A4 pieces of paper with photographs/graphics, can only properly be deemed as 'pictorial exhibits'. The said inlays are indistinguishable from books of photographs or other images routinely included in the page count in other criminal cases. Again the Crown relied upon the printed inlay information and pictures [or lack of] to support the assertion that they were counterfeit. Numerous inlays were paraded before the jury for consideration.
>
> The prosecution chose to serve these exhibits in their entirety to highlight the sheer gravity of the case. Numerous DVDs/inlays, showing pictures of actors and other graphics were shown to the jury throughout the trial, and the entire 173,900 were available should it have become necessary to view them, or should the jury have wished to examine them. This was emphasised by the Crown.
>
> "The determining officer provides no explanation in her written reasons as to how she draws the conclusion that these exhibits are not 'pages' within the strict letter of the graduated fee scheme. AS the graduated fee scheme is to be applied strictly in accordance with its words (discussed further below) it is submitted that the DVDs/inlays

are correctly 'pictorial exhibits', in that they contain/consist of photographs and other graphics/pictures."

18 The grounds of objection added that the graduated fees scheme was to be interpreted strictly. In this regard the notice of objection said this:

> "The Determining Officer was correct in her assertion, citing *R v Kemp* (itself considering *R v Phillips*) that the graduated fee scheme is a 'comprehensive scheme which must be applied according to its explicit words'. There can be no doubt that the scheme is a rigid one, which must be applied to its letter, regardless of the fact that, on occasion, this may result in anomalies; see e.g. *Martin Meeke QC v The Secretary of State for Constitutional Affairs*.
>
> There is no requirement within the scheme that counsel is required to have read/studied the evidence which is to form the basis of the calculation of pages of prosecution evidence. On a literal, rigid interpretation of the scheme, as has typically been applied, counsel is therefore entitled to be paid for <u>all</u> pages of prosecution evidence, regardless of the scrutiny to which he has subjected them.
>
> Notwithstanding the above, thorough consideration was given to the DVDs/inlays served. It would have been open to counsel to require the prosecution to prove that each and every DVD seized was counterfeit; this was particularly so because the prosecution accepted from the outset that the defendant was trading a number of genuine DVDs. However, counsel saved vast expense by drafting admissions to the effect that the majority of the DVDs/inlays were indeed counterfeit. Nevertheless, the prosecution still wished to serve the entirety of the DVDs/inlays as exhibits, so that they gravity of the case was brought home to the jury and so that they could be regularly referred to.
>
> Had counsel so elected, in accordance with Part 4 paragraph 19(2), Counsel would have been able to claim for viewing the discs [or parts thereof] since they were part of the evidence in the case. It is submitted that this would have complied with the 'letter' of the scheme but would, nevertheless, have been against the 'spirit' thereof. Counsel would have been criticised for such a claim."

19 The response on behalf of the Secretary of State contained as its essential submission three paragraphs as follows:

"7. On the wording of the Funding Order it is plain that the Graduated Fee Scheme prescribed by Schedule 4 is a comprehensive scheme providing for the remuneration of defence advocates in criminal legal aid proceedings in the Crown Court. Any case that meets the criteria for graduated fees prescribed under Part 1 of Schedule 4 must be paid fees in accordance with the scheme and with the exception of appeals, committals for sentence, and committals to be dealt with for a breach of a Crown Court order, there is no provision for the advocate to elect, or the determining officer to pay, fees other than those prescribed in Schedule 4. Similarly there is no discretion allowing the determining officer to choose among the different fees prescribed in Schedule 4 on the ground of reasonableness, or to extend a given fee beyond the cases to which it applies on its wording.

8. To be included in the page count, as defined under paragraph 1(2) of Schedule 4, the said pages must form 'part of the committal or served prosecution documents or be included in any notice of additional evidence. (See *R v Sturdy* X9 of the Graduated Fee Guidance – copy attached). The addition of the words 'or served prosecution' in paragraph 1(2) since the decision in *Sturdy* was inserted to reflect the fact that not all cases are now committed to the Crown Court and can be sent or transferred. Consequently, the prosecution pages of evidence must be included in either the committal/transfer/sent documents or in any notice of additional evidence. It is also necessary to give the words 'pages' and 'documents' their literal meaning. According to the court records only 1,956 pages of prosecution evidence meet the definition under paragraph 1(2) of Schedule 4. This, as far as 1,038 paper exhibits are concerned, has been verified by the determining officer contacting the prosecuting solicitors to confirm the number.

9. Should the Costs Judge be against our submission on the proper interpretation of paragraph 1(2) of the Schedule 4, we would submit hat consideration should be given to the decision of Costs Judge Campbell in *R v. Rigelsford* (X42 of the Graduated Fee Guidance – copy attached). In that appeal the Costs Judge commented that there was 'something unsatisfactory about a submission which, if accepted, would result in public funds paying out tens of thousands of pounds to remunerate counsel for a job she did not do in full, namely examining all the photographs in the case'. This, we submit, counters the appellant's argument that 'there is no requirement within the scheme that counsel is required to have read/studied the evidence which is to form the basis of the calculation of pages of prosecution evidence'.

We further submit that, as in the case of *Rigelsford*, only a sample of the DVDs and inlays were put before the jury in this case. In addition to this the defence made an admission that the majority of the DVDs and inlays were indeed counterfeit."

20 This met with an equally forceful and concise response on behalf of the appellants as follows:

"**1. Paragraph 7 of the LCD's representations**

(i) It is stated by the LCD in paragraph 7 of its submissions that 'any case that meets the criteria … must be paid in accordance with the scheme.' It is further accepted by the LCD that there is 'no provision for the advocate to elect … fees other than those prescribed' and that, most importantly, 'there is no discretion allowing the determining officer to choose among the fees … on the grounds of reasonableness.' It is submitted on behalf of the appellants that the meaning of the preceding sentence (taken from the case of *R v Kemp*, citing the LCD's own submissions in *R v Phillips*) is clear: there is no discretion afforded to the determining officer to decline or Farry payment of the prescribed fee under the scheme, either in favour of counsel, or in favour of the LCD. This is the case regardless of whether it results in putative 'unfairness' to either party.

2. Paragraph 8 of the LCD's submissions

(i) It is agreed, as outlined in paragraph 8 of the LCD's submissions that to be included in the page count the said pages must form 'part of the committal or served prosecution documents …' In this case, there can be no dispute that the 'pages' in question were included as part of the Crown's original committal bundle and can only properly be characterised as 'served' prosecution evidence. Should there be any dispute, the Appellants would rely on the exhibit index to the original committal bundles and the explanatory letter drafted by counsel for the prosecution, Mr. Groome.

(ii) The LCD states in its representations at paragraph 8 that it is necessary to give the words 'pages' and 'documents' their literal meaning. This point is not expanded upon, nor does it appear to be supported by any authority cited in the LCD's submissions. The appellants aver that 'pages' is strictly defined by the terms of the scheme: Schedule 4, Part 1, Section 1, subsection 2 of the Criminal Defence Funding Order (as amended) dictates that:

'For the purpose of this Schedule, the number of pages of prosecution evidence shall include all witness statements, documentary and pictorial exhibits and records of interview with the assisted person and with other defendants forming part of the committal documents or included in any notice of additional evidence.'

The appellants reiterate that the scheme 'must be applied in accordance with its explicit words' (again, *R v Kemp*, citing the LCD's own submissions in *R v Phillips*). The Appellants further rely on the case of *R v Sturdy* to support the assertion that the application of the scheme is to be a matter of 'pure construction'. It is further submitted that *R v Sturdy* provides authority for the proposition that it is irrelevant whether, when the words of the scheme are purely construed, the result is 'contrary to the spirit thereof'.

3. Paragraph 9 of the LCD's submissions

(i) The LCD cites the case of its *R v Rigelsford* in paragraph 9 of its representations; essentially, it would appear, in order to suggest that a test of 'reasonableness' or 'justness' is to be imported into the determination of fees under the scheme. The Appellants submit that the other authorities cited in these submissions are at odds with *R v Rigelsford* and make it clear that reasonableness or justness is not a valid consideration under the scheme. In *R v Sturdy*, the learned costs judge expressed sympathy for counsel treated harshly by the scheme, but nonetheless felt compelled to make a decision which 'was contrary to the spirit' of the regulations. The learned costs judge felt similarly bound to make a ruling upholding the rigidity of the scheme in *Martin Meeke QC v The Secretary of State for Constitutional Affairs*. It is submitted that the result in each of those cases was not 'just' in the manner discussed in *R v Rigelsford*, but justness was irrelevant. Moreover, the same learned costs judge who presided over the case of *R v Rigelsford* did not read any similar requirement of justness into the graduated fee scheme when determining the case of *R v Beckford*. There, the learned costs judge interpreted the scheme to the letter, notwithstanding that, 'the outcome [gave] the appearance of being unjust.' It is submitted that, if the scheme truly required the importation in certain circumstances of a test of reasonableness or justness, the costs judge in all the above cases would most probably have awarded the fees as requested by counsel.

(ii) It is submitted that the LCD has chosen to implement a scheme which is deliberately rigid in its interpretation, the result of which is frequent unfairness to advocates. The LCD has, further, confirmed its position with regard to the rigidity of the interpretation of the scheme through case law (e.g. through the submissions made in *R v Phillips*). It is submitted that it is disingenuous for the LCD to now adopt the position that, where a rigid interpretation results in an unfavourable outcome for the LCD, as opposed to counsel, the scheme may be applied far less strictly. It is submitted that such reasoning is both intellectually dishonest and an affront to natural justice.

(iii) Notwithstanding the above, the Appellants seek to reiterate the point made in earlier submissions, namely that thorough consideration was given to the DVDs/inlays served. It would have been open to counsel to require the prosecution to prove that each and every DVD seized was counterfeit: yet counsel saved expense to the public purse by drafting admissions to the effect that the majority of the DVDs/inlays were indeed counterfeit. This case can again be distinguished from *R v Rigelsford*, on the basis that, unlike in *R v Rigelsford*, the entirety of the exhibits in this case were brought to court and deliberately made available by the Crown for the jury to inspect at any point."

21 In his judgment Master Rogers said that, while he could understand and follow the arguments of the appellants, he shared Master Campbell's unease expressed in *Rigelsford* that tens of thousands of pounds should be paid to counsel for not looking at a number of photographs even though they were formally served. In this case, significantly, counsel admit that they did not look at every DVD or inlay. Nonetheless, not without hesitation, Master Rogers came to the conclusion that the submissions of the Department for Constitutional Affairs, both in paras.8 and 9 of their submission, should prevail, and for that reason he held that the appeal failed.

22 On behalf of the appellants before me, Mr. Goodman, rightly in my view, observed that para.9 of the submission of the Department of Constitutional Affairs was, on the face of it, inconsistent with para.8 if, as was contended in para.8, the words "pages" and "documents" must be given their literal meaning. It ran entirely counter to that approach to submit that there is some discretion available to the appropriate officer or the costs judge enabling the relevant authority to avoid paying out the sums which were, on the face of it, due to counsel.

23 Indeed Mr. Sachdeva in the course of Mr. Goodman's oral submissions conceded that there was no super-added discretion under Schedule IV of the Funding Order. If, on its true construction, the provisions in the Schedule provided for payment of a particular sum then there was no additional mechanism entitling the Department to claim that there should be some reduction on grounds of general unfairness.

24 Among the authorities provided to the court by Mr. Sachdeva was the decision of Gray J. in *Secretary of State for Constitutional Affairs v. Stork* [2006] 1 Costs Law Reports 69. At para.15 Gray J. recorded this by reference to the tables of fees and uplifts in Schedule IV:

> "My assessors have informed me that the amounts laid down in the Tables were worked out as a result of a complex statistical analysis of historical costs across the whole range of Crown Court cases carried out by the Bar Council and the Department prior to the introduction of the scheme. The object of this was to provide 'cost neutrality' as between the old *ex post facto* regime and the new graduated fee scheme. That is to say that, following the introduction of the scheme, barristers as a whole would receive, and the legal aid fund would pay out, neither more nor less in real terms than what had been received and paid in the year preceding the scheme's introduction. To achieve this laudable aim, however, many arithmetical compromises were required with the result that, as was readily recognised at the time, there is a large element of 'swings and roundabouts' in the amounts payable to advocates for carrying out work rewarded by the graduated fee scheme. Since the scheme was introduced the Department have added to it and expanded it."

25 Having read that paragraph I decided that it would be appropriate to ask my assessors whether they agreed with what was said there. My assessors have told me that they both agree with the content of this paragraph. I informed counsel that this was the case and I was told that neither counsel sought to suggest that there was anything inaccurate in that paragraph. The essential conclusion supported by that paragraph is that one must recognise that this scheme is one which has a large element of "swings and roundabouts".

26 Mr. Goodman took me to a number of cases where the swing had operated against counsel. I accept the essential proposition that he was advancing, which is that this scheme is mechanistic and formulaic and the court is obliged to recognise that and indeed in the application of the scheme the court will have to apply a mechanistic and formulaic approach.

27 The question which remains, however, is what does the scheme mechanistically and formulaically require? As to that, Mr. Goodman submitted that the scheme itself gives little assistance as to what a page or a pictorial or documentary exhibit is. He submitted, however, that the inlay and the picture on the face of the DVD, which of course has a side containing graphical material and writing to indicate the name of the motion picture and give information about it, along with a side which could be called "the silver side", which is read by the DVD player, could in each case be categorised as one page of a document or pictorial exhibit. In that regard, he was at pains to explain that American film studios rarely press their own DVDs. They license operators in third countries to do so. Malaysia is pre-eminent as a place where DVDs are stamped in this way. Each time a code is embossed on to the silver side of the DVD. The code shows the maker. What was suggested in the present case was that Malaysian factories were working at night producing additional copies indistinguishable from those legitimately made in the day. In order to remove the code an alcohol based was wiped across the DVD. An expert for the prosecution produce a witness statement and in indicating whether the DVDs were legitimate the prosecution on one or more of the pictures on the side of the DVD, the inlay and the motion picture actually seen by viewing the DVD.

28 In this particular case the inlays did not have the British Board of Film Censors logo and, without such a logo, it was accepted that the sale of the DVDs covered by those inlays must be illegal. It was accepted by both defendants that they had no authorisation from film producers, so where such authorisation was required they could not normally sell in this country. There were some cases where such authorisation was not required – Mr. Goodman said as many as 15 per cent – but the defence saw no purpose in wasting public money in identifying what that 15 per cent would be, given that 85 per cent would remain.

29 In relation to what was claimable under para.7 of Schedule IV, Mr. Goodman accepted that the appropriate officer had to work by reference to what was a page. In a case where the prosecution took four photographs and copied all four on to one page for the purposes of serving their evidence, then Mr. Goodman accepted that that would be a single page.

30 In this case, however, he said that what happened, in effect, was that each individual inlay and each individual side of a DVD with a picture and writing on it became a single page.

31 Turning to the history he noted that a bundle had been provided by the Trading Standards Officer which gave an initial schedule of DVDs and inlays.

However, that was not specifically relied upon for the purposes of the present appeal. What was relied upon was a schedule of evidence lodged by the prosecution within 42 days of the first hearing under Regulation 2 of the Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2000. That was effectively, submitted Mr. Goodman, to be treated as the committal bundle.

32 He summarised the effect of the authorities as being that the question was what was "used material". Where the prosecution decided to take only samples and rely only on samples at trial then it was clear that the defence counsel, although they might have to look at others, indeed a large volume of others, in order to satisfy themselves that a sample was appropriate, would not be a good claim that the pages in relation to the other material were pages for which they could claim.

33 In this case, however, that procedure was not followed. The prosecution decided they wished to use each and every item. Mr. Goodman acknowledged that it would have been possible to watch the DVDs and thereafter to make a claim under para.19 of the Schedule. He said that the conclusion of the defence team was that this would have been a waste of the public purse and it was for that reason that the DVDs were not watched.

34 I explored orally with Mr. Goodman the approach which he was advocating to the question of what constituted a page of documentary or pictorial exhibits. His submission was that where a DVD was relied on solely for the motion picture that could be looked at by viewing the DVD then the DVD would not be a page. He returned to this submission during the course of later discussion, and I shall come on to that shortly.

35 I asked him whether the use in the Schedule of "number of pages of prosecution evidence" might not be an attempt to find a very rough and ready measure of one aspect of how heavy the case is. To put it colloquially, the natural question that a barrister or a barrister's clerk might ask when being told that counsel is wanted for a particular hearing is, "How much paper is there in it?" Mr. Goodman accepted that that was so. It could be seen in para.18 that one measure of which case this would give rise to a claim for work done when attendance proved impossible was that the case actually went to trial and lasted five days or more. An alternative measure for those cases which did not go to trial was that the volume of paper amounted to 150 pages. There had in the past, Mr. Goodman noted, been arrangements under the graduated fees scheme under which the volume of paper could take cases out of the graduated fees arrangements.

36 He made it clear that it was the appellant's case to say that they were claiming a fair remuneration, they simply observed that where rigid interpretation of the scheme had resulted in perceived unfairness to counsel, those swings had to be accepted because that was the way the scheme worked. This particular instance under which quite substantial payments would be made in respect of material that did not need to be the subject of any detailed study could be a roundabout, however unpalatable it may be when looked at its own. There were, he submitted, implications for the Bar generally.

37 An example had been given by Mr. Sachdeva in his skeleton argument of a case where one of the prosecution exhibits was the ***Complete Works of Shakespeare***. Could it be right that prosecution counsel were entitled to treat a shoplifting case as a particularly heavy case because the volume that was stolen was the ***Complete Works of Shakespeare***, running to more than 1,000 pages in the printed text? Mr. Goodman observed that so far as the prosecution were concerned, the contents of the volume were irrelevant. In a case where the contents were an essential ingredient then, he submitted, each page in the book would be a page of evidence. However, where the contents were not an essential ingredient then the pages in the book would not be a page of evidence unless, he said, the prosecution chose to photocopy them. Thus if they chose to photocopy and serve the title page only that would be one page; if they chose to photocopy and serve more pages then however many pages it was that they copied and served, that would be the number of pages for the purposes of Schedule IV. He accepted that in a shoplifting case if nothing were copied then there would be no claim.

ANALYSIS:

38 At the relevant time the phrase "number of pages of prosecution evidence" appeared twice in Schedule IV. In my view, on both occasions where that phrase was used, the Schedule was making reference to this criterion as a means of assessing how heavy a particular case is. Thus, when it is used in para.7, the heavier the case is in terms of the weight of the documents, the greater the prosecution evidence allowance element will be in the graduated fee.

39 Similarly, in para.18, as indicated above, the number of prosecution pages of evidence is used as a criterion in order to determine whether a particular specific payment should be claimable.

40 It is plain that this is a very rough and ready process. As stated in the judgment of Gray J. in *Stork*, there are swings and roundabouts. It seems to

me that it is inevitable that such swings and roundabouts cannot be expected to operate in a way which will be necessarily fair in any particular case.

41 The question which arises in the present case as it seems to me is what is to happen where real exhibits are used material? I say that because, to my mind, the inlays and DVDs all constituted material which fall into the well known category of real evidence. They are things which the defendants were dealing with and which the prosecution said the defendants were dealing with unlawfully.

42 It seems to me that there will be many different types of real evidence. One, for example, may be stolen cash. Indeed, items of cash were listed in the schedule of evidence in the present case. In a case where the prosecution intends to allege that cash has been stolen, it would be astonishing to find that cash forming part of a committal bundle. It would not be produced to the magistrates at an old-style committal so as to be transmitted to the court. It would be held along with other exhibits in the case by the prosecuting authorities. It cannot, to my mind, be sensible to describe cash as a served documentary or pictorial exhibit even though it has writing and pictures on it. It is simply real evidence. However, if the prosecution choose to photograph it and serve copies of those photographs then it will form part of the prosecution evidence. The number of pages that this gives rise to is going to depend on a matter of chance. As Mr. Goodman concedes, it simply depends on how many photos are on a particular page. It will be pure chance as to how many pages there will be. It may be pure chance as to whether the prosecution choose to take photographs of the cash, make copies of those photographs and include them in the material which is part of the prosecution documents.

43 I cannot accept the argument put forward by Mr. Goodman that there should be some additional analysis to be made by the appropriate officer in a case where the prosecution has not taken the step of photographing and then copying a piece of real evidence. The submission, as set out above, is that the matter depends upon whether, in truth, the prosecution need to produce the documentary or pictorial elements of the piece of real evidence as part of their case. An analysis of that kind would be a complex analysis and one which I, for my part, would not expect to be required of an appropriate officer under the mechanistic and formulaic approach which is adopted in this schedule.

44 It seems to me that the schedule has taken a very rough and ready measure indeed. There will be a large element of chance as to how many particular pages are involved in any particular case. It would be very surprising if, tacked on to that, there were to be some refined analysis of precisely for what purpose a particular piece of real evidence was relied upon by the prosecution.

45 I cannot see any distinction as regards these inlays and DVDs. The schedule has chosen to work by reference to pages of prosecution evidence. That connotes to my mind something which is on a page. One of the cases I was shown raised a question as to whether a page might take the form of an electronic document rather than a hard document. That does not arise in the present case and I need say nothing about it.

46 I am satisfied, however, that what is needed is that, quite apart from the real evidence, there is produced a page which has been created for the purposes of the prosecution. For whatever reason, that step was not taken in this case in relation to the DVDs and inlays. Accordingly, as it seems to me, this appeal must fail.

47 As to the answers to the questions formulated by Master Rogers, it is convenient to take question four first. Here it seems to me that the appropriate answer is that in relation to the DVDs and inlays in the present case the question which arises is whether they constituted pages of prosecution evidence. They did not constitute such pages for the reasons given earlier in this judgment.

48 It is then convenient to take question one. The answer to that question is that, in considering whether a document constitutes a page of prosecution evidence, regard must be had to the mechanistic and formulaic approach which is generally adopted in the schedule. If a claimant establishes that a document or pictorial exhibit does indeed constitute a page of prosecution evidence then there is no super-added discretion entitling the appropriate officer to refuse to allow the claim. In these circumstances, questions two and three simply do not arise.

L A T E R :

49 On behalf of the respondent Secretary of State Mr. Sachdeva seeks an order for costs on an indemnity basis. He has submitted a schedule of costs. In answer, Mr. Goodman has observed that this case involved an important point of principle and that the case came before the High Court on a matter of general public importance. He added that this was a case where the representations made by the Department to Master Rogers had been difficult to follow. The real nature of the contentions to be advanced against the appellants only became apparent last week when Mr. Sachdeva's skeleton argument was served and one found arguments being put forward which were substantively different from those which had been advanced before Master Rogers.

50 I have considerable sympathy with the second of these points. It does seem to me that the true nature of the objections to the contentions put forward on behalf of the appellants only really became apparent when the skeleton argument for the Secretary of State was served very recently.

51 I am influenced by the fact that this was a case where the point certified was one of general public importance, although I note of course that no appeal can be made to this court without such a certification.

52 However, it certainly seems to me that this is not a case where it is appropriate for an award for indemnity costs. In the light of the very late stage at which the real objections to the case were put forward on behalf of the appellants were made plain by the Secretary of State, I conclude that the justice of the matter would be best served by an order that each side bear their own costs.

_____