Disclosure failures and Abuse of Process. – Colin Wells

A. Introduction

The recent media attention on disclosure failures in the criminal justice system highlights an age old problem.

This articles considers the remedy of staying proceedings as an abuse of process based upon prosecution disclosure failures.

The distinction between the issues of disclosure and abuse of process was considered in *Herbert Austin*.[1] The disclosure aspect has to be considered first. If the material does not fall to be disclosed, either because it does not come within the scope of the disclosure obligations or because the judge has permitted non-disclosure (for example because of public interest immunity) that is the end of the matter. The disclosure issue will have been determined, and proceedings cannot be regarded as an abuse of process where the application is based on non-disclosure of material that does not have to be disclosed.

B. Right to a fair trial

The importance of disclosure in ensuring the right to a fair trial cannot be overstated. Clear recognition of the need for proper disclosure can be found in the Attorney General's Guidelines:

> Disclosure is one of the most important issues in the criminal justice system and the application of proper and fair disclosure is a vital component of a fair criminal justice system. The 'golden rule' is that fairness requires full disclosure should be made of all material held by the prosecution that weakens its case or strengthens that of the defence.[2]

[1] *Herbert Austin* [2013] EWCA Crim 1028; [2014] 1 W.L.R. 1045;[2013] 2 Cr.App.R.33; [2013] Crim.L.R.914

[2] See foreword in ' Attorney-Generals Guidelines on Disclosure (April 2005)

Fair disclosure of information to an accused , by the prosecution is 'an inseparable part of a fair trial ' under Article 6 of the ECHR. [3]

As Lord Bingham stated in *H*[4]: when referring to unused material:
Bitter experience has shown that miscarriages of justice may occur where such material may occur where such material is withheld from disclosure. The golden rule is that full disclosure should be made.

C. Statutory regime : CPIA 1996

The statutory regime for duties and disclosure responsibilities in a criminal investigation commenced after April 2005, the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003. Part I (sections.1-21) has created a staged approach (initial prosecution disclosure, defence disclosure, continual review by the prosecution). Part II (sections 22-27) provide for a code of practice for regulating action the police must take in recording and retaining material obtained in the course of a criminal investigation and revealing it to the prosecution for a decision on disclosure. A revised code of practice was brought into operation on March 19th 2015. Revised guidelines on disclosure were published by the Attorney General in December 2013, in conjunction with a revised judicial on the disclosure of unused material in criminal cases; these replace earlier guidelines and an earlier protocol and, in accordance with Criminal Practice Direction iv (Disclosure) 15 A ,unreported, September 29th 2015 ,they should be read together as complementary , comprehensive guidance that should be complied with.

[3] See Para 1 of 'Attorney Generals Guidelines on Disclosure ' (April 2005)
[4] [2004]UKHL 3 at para 14

There are a number of consequences which arise out of the CPIA procedure.

(i) It is the prosecution who apply the test . This is of course meant to be objective, however, given some of the disclosure decisions that have historically led to the collapse of cases in the past there concern as to the approach taken.

(ii) The prosecution is absolved from time limits and it is common that the Crown repeatedly return to court to seek further time for the service of material. It should be noted, however, that judges should be encouraged to use their case management powers to speed up and affect full proper disclosure.

D. Case law disclosure Guidance

For guidance as to the correct approach to disclosure see five key principles set out by Sir Brian Leveson P in the Court of Appeal case of *R*[5]

(1) The prosecution must be in the driving seat at the stage of initial disclosure,[6] adopting a considered and appropriately resourced approach, including an overall disclosure strategy, selection of software tools, identifying and isolating material that was subject to legal professional privilege and proposing search terms. A disclosure Management document should clarify the prosecution's disclosure approach and identify disputed issues. Explanation would prompt early engagement from the Defence as embodied in the Better case Management initiative;[7]

(2) The prosecution must encourage dialogue and prompt engagement with the defence, with the defence under a duty to engage with the prosecution.

[5] [2015] EWCA Crim 1941; Archbold Review [2015] 1 page 1-2
[6] At para.32 of judgment
[7] At para. 34 of judgment

Initial disclosure required an analysis of the likely cases of the prosecution and defence;[8]

(3) the prosecution was not required to do the impossible.[9] The prosecution was entitled to use appropriate sampling of items and search terms and its record- keeping and scheduling obligations were modified.[10] The prosecution should formulate a disclosure strategy, discuss the same with the court and the defence, utilizing technology to make appropriate searches, recording the same;

(4) the process of disclosure should be subject to robust judicial case management[11] as clear from case law since Jisl;[12]

(5) flexibility was crucial, with the judge, after discussion with the parties, devising a tailored or bespoke approach to disclosure, subject to the CPIA.[13]

As pointed out by the Court of Appeal in the case of *R*[14] the scene is set by the Criminal Procedure Rules, underlined by Gross LJ at para 31 of his review:

The Rules now consolidate the courts's case management powers and furnish a guide to the underlying culture intended to govern the conduct of criminal trials. Accordingly , the rules should be cited and used in the proper application of the disclosure regime.

The importance attached to adherence to court orders and effective case management, which obviously includes disclosure is illustrated by the remarks of Sir Brian Leveson P in the Court of Appeal in *Boardman*[15]*:*

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[8] At para.35 of judgment
[9] At para. 36 of judgment
[10] see *Brendan Pearson and Paul Cadman* [2006] EWCA Crim 3366 and the AG's 2013 Guidelines
[11] At paras.39-41 of judgment
[12] [2004] EWCA Crim 696. See also *Boardman* [2015] EWCA Crim 175.
[13] At paras. 49-51 of judgment
[14] [2015] EWCA Crim 1941
[15] [2015] EWCA Crim 175

"*Whatever we do, we must encourage a reduced tolerance for failure to comply with court directions along with a recognition of the role role and responsibilities of the Judge in matters of case management. It cannot be right that a 'culture of failure' has developed in courts, fed by an expectation that deadlines will not be met. If a deadline (e.g. for service of documents or an application) is not met, there must be good reason for it.*"

E. Post Defence Statement

Post service of a defence statement, the defence may make an application for specific disclosure for any material which it has reasonable cause to believe should have been disclosed pursuant section 3 CPIA.[16]

Any application for further disclosure will usually arise from the schedule of unused material compiled by the prosecution, the MG6C, and served as part of their duties under section 3. It is usual for the MG6C to be updated as the process of disclosure continues even after service of the defence statement. Often at an early stage there will be requests by the defence for clarification as to items on the schedule which may be vaguely or incorrectly described. It is not unusual to see descriptions such as " box of documents " on a schedule which are of no assistance to anyone, either the prosecution in satisfying their duties to examine the material in their possession or the defence in trying to identify material that may be of assistance to them.

Accurate scheduling is therefore essential to the proper implementation of the disclosure regime. The CPIA code of practice 2015 paragraph 6.2 provides that " material which may be relevant to an investigation, which has been retained in accordance with this code, and which the disclosure officer believes will not form part of he prosecution case, must be listed

[16] S8 CPIA 1996

on a schedule “

At paragraph 6.9 the disclosure officer should ensure that each item of material is listed separately on the schedule , and is numbered consecutively. The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed.

At paragraph 6.10 in some enquiries it may not be practicable to list each item of material separately . For example ,there may be many items of a similar or repetitive . These may be listed in a block and described by quantity and generic title. And at paragraph 6.11, even if some material is listed in a block ,the disclosure officer must ensure that any items among that material which might satisfy the test for prosecution disclosure are listed and described individually.

F. Disclosure failures and abuse of process

A failure on the part of the prosecution to make proper disclosure might result in appropriate circumstances in proceedings being stayed as an abuse of process. However, not all failures to disclose lead to proceedings being stayed, as a fair trial might still be possible.

When considering an applications to stay proceedings based on defence complaints of non-disclosure the following factors should be considered :[17]

- Whether the failure to disclose was due to inadvertence, inefficiency or deliberate conduct;

[17] See Mr. Justice Randerson list in *Attorney-General v District Court at Hamilton* [2004] 3 NZLR 777 at page 791

- Whether the prosecutor had acted in good faith;
- Whether the non-disclosure could damage the prosecution case or advance that of the defence;
- The extent of any prejudice to the accused in the conduct of the defence case as a result of the non-disclosure;
- Whether the accused could nevertheless receive a fair trial without undue delay;
- Whether remedies short of a stay could achieve a fair trial (such as an adjournment to allow disclosure and instructions to be taken on the new disclosure, and the exclusion of evidence);
- At appeal level whether taking all the circumstances of the trial into account, there was a real possibility that the jury would have arrived at a different verdict.[18]

- A balancing exercise is adopted by the Court of Appeal (in section 58 2003 Prosecutors appeals) where extreme disclosures failures have taken place leading to proceedings being stayed : see *(S)D and S(T)*[19] In carrying out this balancing exercise it was necessary to consider a number of factors such as : the gravity of the charges; whether the complainants would be denied justice; the importance of disclosure in sexual offences; the necessity for proper attention to be paid to disclosure[20]; the nature and materiality of the failures.

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[18] *McInnes v HM Advocate* [2010] UKSC 7 applying *Spiers v Ruddy* [2008] 1 AC 873; [2007] UKPC D2

[19] [2015] 2 Cr.App.R.27.

[20] As per *Olu* [2010] EWCA Crim 2975; [2011] 1 Cr.App.R. 33