Crime and procedure—when to disclose in financial crime cases

15/01/2016

Corporate Crime analysis: The Court of Appeal has handed down some conclusions about the current law and practice on the disclosure of unused material and abuse of process in financial crime cases. Alan Ward, an associate in the regulatory litigation practice group at Stephenson Harwood, summarises the court's key points.

Original news

R v R and others [2015] EWCA Crim 1941, [2016] All ER (D) 06 (Jan)

The Court of Appeal, Criminal Division, in a case likely to encompass allegations of very substantial fraud, lifted the statutory reporting restrictions, in part, to enable publication of extracts of the judgment, in order to give guidance on the proper approach to disclosure and abuse of process. In particular, it considered how the prosecution was to comply with its initial disclosure obligation, under section 3 of the Criminal Procedure and Investigations Act 1996 (CPIA 1996), if it had not read, and could not be expected to read, all the material it had seized.

What is the background to this case?

The criminal case with which this judgment is concerned is proceeding to trial, and so little of the factual context is publicly known. The judgment itself is published, albeit in anonymised form (with reference to section 71 of the Criminal Justice Act 2003), as the issues engaged raise questions of substantial practical importance, with regards to the proper approach to disclosure and abuse of process.

The case at issue concerned an allegation of 'very substantial' fraud. Electronic materials seized by police officers in the course of the investigation contained a total of seven terabytes of data.

Owing in no small part to the vast quantity of data in the possession of the investigating agency, the case proceeded for five years without the prosecution completing primary disclosure. Consequently, the trial judge stayed all counts on a draft indictment as an abuse of process, ruling that the passage of time meant that it was not possible for the defendants to have a fair trial.

What were the issues which were before the Court of Appeal (Criminal Division)?

The judgment of the Court of Appeal, handed down on 21 December 2015, relates to an application by the prosecution for leave to appeal the trial judge's decision to stay the prosecution—on the grounds that the judge had adopted an incorrect approach to the issue of initial disclosure—and in any event, having regard to the issues in the case and all the circumstances, had been wrong to stay the entire prosecution.

The Court of Appeal took the opportunity this case presented, having sought the assistance of the Attorney General, to provide guidance as to how the court, prosecution and defence should approach disclosure in complex fraud or financial crime cases. In such cases, the number of electronic files that come into the possession of those investigating will, almost inevitably, be too vast to individually review and catalogue.

With reference to the disclosure obligation in CPIA 1996, the Court of Appeal sets out to clarify who should review such data, how it should be reviewed, and in what timescale.

What guidance or assistance does this case provide on the duties of disclosure on the prosecution, particularly in financial crime cases?

In considering its judgment, the Court of Appeal had regard to the 'framework of law and guidance' which sets out, in practice, how the disclosure obligations in CPIA 1996 are to be met, including:

- the Criminal Procedure Rules (CrimPR)
- the Criminal Procedure and Investigations Act Code of Practice (the Code)
- the Attorney General's Guidelines on Disclosure 2013 (the 2013 Guidelines), and
- the judicial protocol on the disclosure of unused material in criminal cases (December 2013) (the protocol) (incorporating recommendations contained within the review of disclosure in criminal proceedings, September 2011, conducted by Gross LJ (the Review))

The guidance offered by the Court of Appeal can be summarised as follows:

The prosecution is and must be in the driving seat at the stage of initial disclosure

The Court of Appeal provides a prescription for the steps a prosecutor must take, from an early stage:

'To fulfil its duty under section 3, the prosecution must adopt a considered and appropriately resourced approach to giving initial disclosure. Such an approach must extend to and include the overall disclosure strategy, selection of software tools, identifying and isolating material that is subject to legal professional privilege ("LPP") and proposing search terms to be applied. The prosecution must explain what it is doing and what it will not be doing at this stage, ideally in the form of a "Disclosure Management Document".'

The prosecution must then encourage dialogue and prompt engagement with the defence

Notwithstanding the Court of Appeal's contention that the prosecutor 'must be in the driving seat', it also observed that the defence has a 'duty' to 'engage with the prosecution', through early identification of the issues in the case (primarily, in a defence case statement) and, subsequently, by suggesting and agreeing appropriate search terms, to aid the identification of material that may need to be disclosed.

One can anticipate a defendant who makes a complaint about the disclosure process receiving short shrift from judges in the future, if he has not taken such steps as the Court of Appeal describes to engage meaningfully with the prosecution and disclosure process.

The law is prescriptive of the result, not the method

The CPIA 1996 is silent as to how the prosecutor should, in practice, conduct the disclosure exercise, particularly in cases involving a vast quantity of electronic material.

The Court of Appeal recognised that:

'The prosecution's duties of record keeping and scheduling must likewise reflect the reality that not every one of perhaps many millions of e-mails is to be individually referenced.'

As such, methods such as dip-sampling, the application of search terms, scheduling and 'block listing' are appropriate in complex cases, so long as the prosecutor is able to describe the methodology employed, including, for example, what search terms have been used.

The process of disclosure should be subject to robust case management by the judge, utilising the full range of case management powers

The Court of Appeal rejected, in robust terms, submissions advanced by counsel for the prosecution, supported by counsel for the Attorney General, to the effect that the Crown Court's case management powers are 'limited to exhortatory observations or guidance':

‘The court is both entitled and obliged to give orders and directions to address the failing with which it is confronted. Neither is the judge required to watch the case become diverted from its proper course, powerless to stop it doing so until much time and costs have elapsed.’

Some guidance is also provided on the wording of CPIA 1996, s 3 which provides that certain defence obligations (such as to provide a defence statement) are triggered when the prosecutor has ‘purported to comply’ with CPIA 1996, s 3 (by providing initial disclosure):

‘compliance with the prosecutor’s duty under s.3 must mean substantial compliance. Realistically, it cannot be supposed that cases will never proceed beyond the stage of initial disclosure merely because some documents have not yet been disclosed. A search for perfection in this area is likely to be illusory. Secondly, both ss. 5 and 6 provide for a defence statement to be given not only when the prosecutor has complied with s.3 but also when he has purported to comply with it. Progress can and should thus be made, even where it is or may be apparent that further prosecution disclosure might be required in the future. It also follows that cases are not doomed to proceed in compartmentalised, consecutive stages; progress can be made in parallel, both completing outstanding initial disclosure and illuminating the true issues in the case pursuant to ss. 5, 6, 7A and 8.’

Flexibility is critical

The Court of Appeal noted that, in a document-heavy case, very often, a ‘tailored or bespoke approach’ to disclosure will be preferable to a ‘box ticking exercise’.

Two additional, noteworthy points made by the Court of Appeal concern the circumstances in which the defence can, properly, complain about a disclosure process:

‘Save very exceptionally, a party is not permitted to acquiesce in an approach to the case before the judge at first instance and then renounce its agreement and advance a fundamentally different approach on appeal. Parties must get it right first time.’

Also, the circumstances in which a preparatory hearing—which allows for an interlocutory appeal against a pre-trial ruling—might be appropriate:

‘In general, parties are discouraged from seeking preparatory hearings….The mere desire of one party to test a ruling by interlocutory appeal [is] not a good enough reason for doing so….We are bound to agree that preparatory hearings should be very few and far between.’

What guidance or assistance does this case provide on when a failure to disclose by the prosecution can be an abuse of process?

As well as re-stating the well-known test for abuse of process, the Court of Appeal made some important observations which addressed a question that is often posed by practitioners in the context of long-running and document-heavy financial crime prosecutions:

‘how long does a disclosure exercise have to go on for, or how badly managed does a prosecution have to be, before it can be stayed as an abuse of process?’

The Court of Appeal noted ‘the effect that the delay has had on the [defendants] personally; the significant inconvenience and distress it will have caused to have these proceedings hanging over them’.

However, the court deemed that the trial judge, in staying the prosecution, ‘appears to have placed greater weight on [the] personal prejudice [to the defendants] rather than considering whether there is serious prejudice in the sense that they will be deprived of a fair trial’.

As regards abuse of process, the Court of Appeal drew a distinction between cases of prosecutorial misconduct—where a stay may well be justified—and cases of prosecution mismanagement, where it may not:

‘On the other hand, however, it is important that conduct or results that may merely be the result of state incompetence or negligence should not necessarily justify the abandonment of a trial of serious allegations.’

This conclusion seems to run contrary to the Court of Appeal's earlier observation in the judgment that 'The wording of s.3 was not intended to give the prosecution carte blanche to under-perform'.

Although it is possible to envisage a case in the future where the delay, or 'state incompetence or negligence', is so grave as to amount to an 'an affront to the public conscience' and an abuse of process, many practitioners will be disappointed that the Court of Appeal did not take the opportunity draw that line in this case, where the delay in the disclosure process (five years) was extreme.

Interviewed by Duncan Wood.

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