Steering the right (disclosure) course

Polly Dyer reviews the conclusions of a Court of Appeal master class in the proper approach to disclosure & abuse of process

IN BRIEF

- The disclosure regime reviewed & delay as a basis for a stay.

Publication of the redacted judgment in *R v R & Others* [2015] EWCA Crim 1941, [2016] All ER (D) 06 (Jan) in December gave practitioners an excellent overview of the current law and practice on the disclosure of unused material in the prosecution's possession, as well as guidance on the proper approach to disclosure and abuse of process.

Background

During the course of the investigation of this matter a number of electronic devices had been seized, such that the prosecution held some seven terabytes of data. The prosecution evidence had long since been served but five years had passed without the case progressing beyond an argument regarding whether the prosecution had complied with their duties of initial disclosure. Ultimately, the judge stayed the prosecution in respect of all counts of a draft indictment (which had not reached the stage of being preferred) as an abuse of process. The prosecution applied for leave to appeal that decision 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. Given the issues in the case, particularly the former, the Court of Appeal consisted of Sir Brian Leveson P, Gross and Fulford LJJ—a triumvirate of the grandees in the law on disclosure—while the Attorney General accepted an invitation to intervene. As mentioned above, a redacted version of the judgment was provided at this stage due to the importance of the issues involved and in order to give guidance on the proposed approach to disclosure and abuse of process.

The disclosure regime reviewed

The court considered the ability of the criminal justice system to fairly manage cases (likely, in the main, to concern allegations of very substantial fraud) comprising a vast electronic database through the techniques of disclosure, and which have been developed through the Criminal Procedure and Investigations Act 1996 (CPIA 1996) and the various protocols and guidelines subsequently issued.

Ultimately, the court was anxious to ensure that the burden of disclosure should not render the prosecution of economic crime impractical (as observed in the *Gross Review* and reaffirmed in the *Judicial Protocol on the Disclosure of Unused Material*) and in that vein set out a summary of principles, or guidelines, on how disclosure reviews should be undertaken in such circumstances, namely:

- The prosecution is and must be in the driving seat at the stage of initial disclosure: the prosecution must adopt a "considered and appropriately resourced approach to giving initial disclosure", including by using software tools, identifying and isolating material that is subject to LPP and proposing search terms. The approach should be case specific and must be explained, ideally in a "disclosure management document".
- The prosecution must then encourage dialogue and prompt engagement with the defence. The court also reiterated that the defence must then engage with the prosecution.
- The law is prescriptive of the result, not the method: the court reaffirmed that in cases where there are vast volumes of electronic material, the prosecution is not required to do the impossible, nor should the duty of giving initial disclosure be rendered incapable of fulfillment through the physical impossibility of reading (and scheduling) each and every item of material seized—common sense must be applied. In such circumstances, the prosecution is entitled to use appropriate sampling and search terms and its record-keeping and scheduling obligations are modified accordingly, for example, block listing should be utilised. The prosecution should formulate its strategy then canvass it with the court and defence.
- The process of disclosure should be subject to robust case management by the judge, utilising the full range of case management powers. Rejecting submissions by the prosecution and Attorney General, the court held that prosecutorial decisions or failures are not beyond challenge or immune from the court's case management powers. However, the judge should have regard to the stage of proceedings and bear in mind at the initial disclosure stage that the true issues in the case may as yet be unclear. The judge's aim, apart from seeking to hold the prosecution to its duty of giving initial disclosure and insisting on defence engagement, must be to drive the case as expeditiously as possible towards the stage where a defence statement is required, the issues can be crystallised and questions of further disclosure dealt with on a reasoned and informed basis pursuant to CPIA 1996, ss 7A and 8. The court also made clear that compliance with the prosecutor's duty under s 3 means substantial compliance and a case should not grind to a halt at this stage simply because some documents have not yet been disclosed. Progress can and should be made, even where it is or may be apparent that further prosecution disclosure might be required in the future. 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: disclosure is not a box-ticking exercise (as emphasised in *R v Olu* [2010] EWCA 2975; *R v*

Malook [2011] EWCA Crim 254). In a document-heavy case (whether electronic or paper), there can therefore be no objection in principle to the judge, after discussion with the parties, devising a tailored or bespoke approach to disclosure. However, whatever the approach adopted, there is one overriding proviso: the scheme of CPIA 1996 must be kept firmly in mind and must not be subverted. The constant aim must be to make progress, if need be in parallel, from initial disclosure to defence statement, addressing requests for further disclosure in accordance with s 8.

The court was keen to emphasise that the above principles are already apparent in the legislation and guidance provided. While that is so, they are likely to be welcomed by prosecutors, particularly the re-emphasis that there is not an expectation in cases involving large quantities of electronic material that each and every document will be reviewed and that s 3 requires substantial compliance and, thus, progress can be made while the review continues.

Of course, what amounts to "substantial" compliance may become a matter for argument. However, while helpful, a number of practical problems still remain for those at the coalface of e-disclosure reviews, for example:

- while the principles call for a considered, case-specific strategy from the outset of the disclosure review, which is meant to assist in making the review manageable, this can be very difficult to conceive when the issues in the case are far from clear; while the use of search terms is approved, even with defence engagement, relevant search terms are likely to produce hundreds of thousands of "relevant" hits in cases involving large quantities of electronic material, all requiring review; and,
- while "block listing" sounds like a useful, practical tool and certainly has the advantage of shortening and making a schedule more manageable, it is a time-consuming process, usually requiring that each document is looked at to ensure it correctly falls under the "block listing" category.

In short, while the burden of initial disclosure remains on the prosecution, it is inescapable that the prosecution of substantial economic crime cases will inevitably involve prosecutors having to expend a great amount of resource, in terms of time, money and manpower on the disclosure exercise.

> *"Flexibility is critical: disclosure is not a box-ticking exercise"*

Delay as a basis for a stay

In reaching his decision to stay the case, the judge had decided that the trial date of January 2016 could no longer be maintained and had concluded that the point had been reached where the delay had deprived the case of the fairness which the respondents and the public were entitled to expect.

He considered the only "appropriate sanction" was to stay the prosecution. This conclusion was on the basis that the defendants would not get a fair trial due to the delay, which had resulted from the prosecution failure to provide CPIA 1996-compliant primary disclosure. On the face of it, therefore, the decision fell squarely within first limb abuse of process (impossible now to have a fair trial). However, the judge also referred to public interest considerations and at times appeared to state his concern about the integrity of the criminal justice system. He also referred to the stay as a "sanction" and repeatedly referred to the prosecutorial failings. Such considerations are not relevant to a consideration of first limb abuse, which should only be concerned with whether it is possible for the defendant to have a fair trial. They only come to the fore during the balancing exercise required in a consideration of where there is second limb abuse; namely whether it is fair to try the defendant.

The authorities make clear that where delay is said to be the basis for a stay, serious prejudice must be shown: unjustified delay by itself is not a sufficient reason (*R v S (P)* [2006] 2 Cr App R 23 (at [21]); *R v F (S)* [2011] EWCA Crim 1844).

The Court of Appeal considered that, having stated that there had been prejudice to the respondents, the judge had placed greater weight on personal prejudice, ie the uncertainty the respondents were facing, rather than considering whether there was serious prejudice in the sense that they will be deprived of a fair trial. In this matter, the case turned in large part on documentary evidence and to the extent that recollections were necessary, the Court of Appeal considered that documents would allow memories to be refreshed, particularly where in this case the respondents had had the case summary and statements for many years. Therefore, in their view, the delay, of itself, was not sufficient to warrant a conclusion that the respondents could not now receive a fair trial. In the event of an adverse verdict, to such extent as the trial judge takes the view that the delay amounts to a breach of the reasonable time requirements of Arts 5(3) or 6(1) of the European Convention on Human Rights, there is clear authority for the proposition that such delay may be cured by a reduction in sentence (*Spiers v Ruddy* [2008] 1 AC 873).

Having concluded there was no basis on which to stay the prosecution under first limb abuse of process, the Court of Appeal went on to consider whether it would nevertheless be unfair to try the respondents now. A balancing exercise is required between "ensuring that those charged with the gravest crimes should be tried and the competing public interest in not conveying the impression that the court should adopt the approach that the end justifies any means" (*R v Latif and Shahzad* [1996] 1 WLR 104).

In this case, there was no deliberate misconduct or bad faith on the part of the prosecution and in conducting the balancing exercise, the court held that it would not be unfair to try the defendants.

Summary

Given the number of years this case had been ongoing, the Court of Appeal's unwillingness to uphold the stay will be seen by many as making it harder still to argue delay as a basis for a stay. This will be particularly so in cases that are predominantly document based, such as large fraud cases. **NLJ**

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