A Note on *R. v. R*, Disclosure and Case Management

Fraud Lawyers Association: 4 April 2016.

1. There are at least 4 different views on *R. v. R*.[1]

   (1) It sets out an coherent, flexible and undogmatic approach to electronic disclosure;
   (2) It encourages a leaner, more efficient and cost effective disclosure process;
   (3) It encourages prosecuting authorities to think that, absent bad faith, they can get away with any degree of incompetence, negligence or ill thought out disclosure process because the courts will nearly always pull its chestnuts out of the fire;
   (4) It represents a missed opportunity.

2. All are true.

The Facts

3. This was a prosecution appeal against a terminatory ruling where it was said that the prosecution had failed to provide CPIA compliant disclosure: §64. Our view of the facts is limited because of the embargo on publication of the full report.
   What is known, or can be inferred, is this:

- The events in question were 10 years old: §69
- It was a document heavy case involving 7 terabytes[2] of raw data containing millions of documents: §2
- The case had not progressed beyond primary disclosure for 5 years: §2
- The disclosure process had been proposed by the trial judge and the prosecution had considered and essentially acquiesced in that process: §53
- there had been plenty of judicial intervention: §3
- The proposed date of trial had been repeatedly postponed from September 2012, to 2013 and beyond: the final trial date of January 2016 could no longer be maintained: §§ 63; 65.
- The postponements were, according to the trial judge "*clearly unjustified*": §65
- Although there had been no deliberate misconduct by the prosecution, the postponements arose because of "*clear fault on the part of the prosecution*": §65; the trial judge repeatedly referred to prosecution failings, and the Court of Appeal

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1 *Practice Note* [2016] 1 Cr.App.R. 288(20); *sub nom. Reg. v. R. and others* [2016] 1 Archbold Review 1, [2015] EWCA Crim. 1941.

2 A terabyte (TB) is 1x 10^9 bytes or 1,000 gigabytes (GB)

observed that some of the steps they had taken had been insufficiently thought through or proved to be ineffective: §§ 64; 73

- There was no suggestion that the respondents to the appeal/ defendants had deliberately set about to undermine the prosecution.

4. The ruling deals with three questions.

5. **First question:** is a trial judge is entitled, absent deliberate prosecution misconduct, to stay the prosecution for abuse of process for failure to abide by the Court's Case Management decisions?

   The short answer, at least in document heavy cases, is that a fair trial is usually possible, because unconscionable delay caused by incompetence can be ameliorated by a reduction in any subsequent sentence: §74. That concept no doubt provides great comfort to those who are acquitted, and equal solace to any plaintiffs whose civil actions are put on hold pending the outcome of the criminal trial.

6. **Second question:** can prosecution Case Management failures bring proceedings to an end?

   The answer to that is yes, but such decisions can only be made on a case by case basis: §74 i.e. it is all a question of fact and degree. It is difficult to conceive of facts which are more favourable to a stay or termination than those listed above, but sensible debate is impossible while the facts are embargoed.

7. Note that the Court expressed concern about the lack of other sanctions and commented:

   To allow successful abuse of process applications where neither prosecutorial misconduct of the type identified in the authorities nor delay such as would prejudice a fair trial can be established would, however, provide a perverse incentive for those charged with criminal offences to procrastinate and seek to undermine the prosecution by creating hurdles to overcome all in the hope that, at some stage, a particular hurdle will cause it to fail: § 74.

8. The Court seems to fail to recognise that such perverse incentives already exist. Trial judges regularly have to distinguish, and are more than capable of distinguishing, between defence histrionics at perceived failures of disclosure, and genuine failures which are capable of derailing a trial.

9. **Third question:** can a prosecution in a terminatory appeal change its case and take points on appeal which it had never argued before the trial judge?

   The Court said: §54

"Changes of case of this nature are disconcerting and potentially very wasteful of time and costs. Whether or not in the present proceedings the appellant is permitted to change its case on appeal, it must be emphasised that parties generally can have no expectation that such a course will be open to them. 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."

10. The above proposition it is perfectly reasonable. The respondents took that very point on appeal. One can only assume that the Court did permit the prosecution to change its argument on appeal, although the judgment never says so, and it is never explained why the circumstances were exceptional. (The full judgment provides little further enlightenment.)

The Guidance

11. As well as answering the 3 questions, the Court of Appeal provided an extensive, powerful and very useful Guidance on e-disclosure. It encapsulates the current law, Guidelines and Protocols, with a focus on electronic disclosure: §5 – 30.

12. The judgment identifies and summarises the main principles:

- The prosecution is and must be in the driving seat at the stage of initial disclosure: §33-34
- The prosecution must encourage dialogue and prompt engagement with the defence: §35
- The law is prescriptive of the result, not the method: §36-38
- The process of disclosure should be subject to robust case management by the judge utilising the full range of case management powers. That embraces all stages of the disclosure process: §39-48 including the initial stage.
- Flexibility is critical: §49-60. It is not a box-ticking exercise.

  There can therefore be no objection in principle to the judge, after discussion with the parties, devising a tailored or bespoke approach to disclosure. That must certainly be preferable to dealing with the matter in a mechanistic and unthinking way. §49

  § 50 *There is also no reason . . . why lessons cannot be learnt from advances in disclosure in civil procedure: see the Review at paras. 79 et seq. However, whatever the approach adopted, there is one overriding proviso: the scheme of the CPIA 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.

13. The heart of the judgment lies in the penultimate sentence of the last paragraph, where the Court resolves the conflict between practical progress and legislation which is well past its sell by date. That conflict is best understood in a wider historical context.

History

14. Disclosure started from small beginnings.

- In 1946 the prosecution were first required to make available to the defence a witness who they knew could give material evidence.[3]
- By 1979 that position had extended to a duty on the prosecution to *"ensure that all relevant evidence of help to an accused is either led by them or made available to the defence"*[4].
- Disclosure of unused material was first introduced in the A-G's Guidelines 1981, but proved to be inadequate.
- In 1993 Court of Appeal in *Ward* [5] said that failure to disclose material which should have been disclosed was likely to constitute a material irregularity. *Ward* was interpreted to mean the defence had to be provided with virtually everything gathered and created during their investigation, with obvious exception of LPP and PII material.

15. That brief history neatly tracks the development and rapid proliferation of paper, from the carbon copy, electric typewriter, and the Gestetner machine to the photocopier.

16. 1946 also saw the first electronic storage of data -126 bytes in a cathode ray tube used as computer memory.[6] By 1996 personal and commercial computers had become established and were developing fast. World capacity to store information grew from 2.6 exabytes[7] in 1986 to 15.8 exabytes in 1993.[8] That is the equivalent of a less than 730 MB of information (i.e. 1 CD-ROM) per person in 1886 to approximately 4 CD-ROMS in 1993.

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[3] *Bryant and Dickson* (1946) 31 Cr App R 146.
[4] *Hennessey* (1979) 68 Cr App R 419, 426
[5] *Ward* (1993) [1993] 1 WLR 619
[6] http://curation.cs.manchester.ac.uk/computer50/www.computer50.org/index.html?man=true#acousticdelay
[7] An Exabyte is 1 million terrabytes i.e. $1x10^{15}$ bytes
[8] Hilbert and López: *The World's Technological Capacity to Store, Communicate, and Compute Information"*, (2011), *Science*, 332(6025), 60–65.

17. By CPIA 1996, there was a strong feeling that *Ward* had gone too far. Two principal arguments were mounted against providing the defence with the keys to the warehouse:

    (i) By ACPO – delivery of keys to the warehouse would permit unscrupulous defendants to trawl through the unused material and invent defences based upon it;

    (ii) Generally, concerns as to cost. Although there were fears expressed about equally unscrupulous lawyers piling up hours unnecessarily examining unused material, there were genuine concerns. No competent solicitor would be prepared to conduct a defence unless he or she was satisfied that there was nothing in the warehouse which might assist the defence. That meant a lot of time-consuming and expensive rummaging. The solution was to let the rummaging be undertaken by a one person. The Crown went through the material anyway and was the obvious choice.

    From those basic premises the structure of the current disclosure regime evolved.

18. Since then e-data has grown exponentially. In 1996 world computer storage was in the region 37 Exabytes. Now it is 3.5 zetabytes. It is estimated that data generation will be 44 zetabytes per year in 2020. In 2002 worldwide digital storage capacity overtook total analogue capacity. In 1986 paper based storage mediums represented 33% of the total: by 2007 in was 6%.[9]

19. Major cases can now involve tens of millions of documents representing terrabytes of data. But to deal with this flow of electronic data, modern criminal courts are armed with 20 year old legislation which was designed to deal with large paper storage systems. Current disclosure processes are like trying to solve jet age problems with steam technology.

20. Of the issues expressed 20 years ago, ACPO's[10] fears about invented defences always seemed slightly paranoid and anecdotal. In any event, the requirement that disclosure should only follow the presentation of a written defence case or outline largely eliminates that concern.

21. The costs argument has also been undermined. It still makes sense in document/electronic heavy cases for one body to prepare an electronic database and for that body to be the prosecution. But once a dataset has been prepared shorn of irrelevant material and LPP, search engines remove the need to look at every document. The defence knows what it is looking for and should be able to search for

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[9] *Science Express*: 10 February 2011

[10] Since 1 November 2015, ACPO has been placed by the National Police Chiefs Council.

25. On the other hand, the judgment is capable of providing authority for a more liberal, and it is submitted, a more sensible and constructive approach to e-disclosure. *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.* §50.

(a) Following *R. v. R.* any disclosure scheme must be broadly fitted into the CPIA structure, however uncomfortably. But that does not mean that some broad disclosure cannot take place before defence statements. Nor does it mean that defence statements have to await disclosure. There is no reason why a timetable cannot be devised whereby initial defence statements are amended at a later stage following final disclosure.

(b) Pre-trial issues can and should be dealt with in parallel i.e. concurrently and not consecutively wherever possible.

In practical terms that means that the prosecution should start work on disclosure issues as soon as a trial appears likely. Thereafter, the prosecution should liaise with the court and the parties on disclosure issues at the earliest opportunity: there is no need to wait for the service of defence case statements, although the actual provision of material might await such service.

LPP issues should always be addressed as soon as possible.

(c) *R. v. R* should not be regarded as a get out of jail free card for prosecutors. The Court of Appeal regarded its circumstances as exceptional. The Court appears to dislike the application in a criminal court, of what would be uncontroversial in a civil court unless it is fitted into the CPIA. But if a bespoke process is agreed and works, and is shoehorned into a CPIA structure, it is difficult to see what sensible objections could be raised.

(d) Although the prosecution are not obliged to provide digital or other information in any particular format, there is no reason why a prosecution cannot be ordered or requested to material in a particular format for Case Management purposes if that will speed up the pre-trial and trial process. There is no reason why the prosecution should not provide a searchable redacted dataset of relevant material in an appropriate case. In practical terms the form and degree of disclosure is a matter for the Crown in consultation with the parties and the court. But they have to get it right, and the courts have to bear in mind both practicalities and cost. Again, predictive coding may well have its part to play.

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4 April 2016

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