RED LION CHAMBERS

Disclosure: A Legal and Practical Updater – Handout

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A Renewed Focus on Material Affecting Witnesses' Reliability?

In *R v Warren* [2021] EWCA Crim 413, the Court of Appeal considered a case that had involved public order allegations and trade union activity. At the time of the original proceedings, the prosecution had assured both the defence and the court that all the relevant witness statements had been disclosed. However, it later emerged that original witness statements from civilians had been destroyed, with replacement statements having been taken and disclosed.

The Court of Appeal held that the failures of disclosure resulted in the convictions being unsafe. Importantly, by tracing the progression of the common law and the influence of the CPIA 1996, the Court of Appeal provided a judicial complement to the new guidelines issued under the CPIA 1996: there is a particular significance in material that may affect witnesses' reliability and the duty of retention must be strengthened accordingly.

The Serious Fraud Office, Powers to Require Disclosure and Foreign Companies

In *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, the Supreme Court considered the power of the Serious Fraud Office to require foreign companies to disclose material for the purposes of an investigation. In short, the Supreme Court held that the SFO's power was curtailed, though this is unlikely to be the last time that cross-jurisdictional issues creep into the arena of disclosure and the powers available to demand it.

The SC held that there is no basis for the Divisional Court's finding that the SFO could use the power in section 2(3) of the Criminal Justice Act 1987 to require foreign companies to produce documents held outside the UK if there was a sufficient connection between the company and the UK. Implying a sufficient connection test into section 2(3) is inconsistent with the intention of Parliament and would involve illegitimately re-writing the statute [64-65].

Hamilton v Post Office Limited: Doctrine- Distinction between Disclosure and Investigation

Hamilton v Post Office Limited [2021] EWCA Crim 577 has often been viewed in terms of the failings of the computer system, Horizon, used in branches of the Post Office.[1] That is a crucial aspect of the judgment of the Court of Appeal: without the bugs, errors and defects marring Horizon, almost all the prosecutions would not have occurred. Hamilton represents an affirmation of proper disclosure as a mark of a system that strives to realise the rule of law,

[1] See, e.g., PA High Court Staff, 'Post Officer's Horizon Scandal and What Happens Next?' (23rd April 2021) *Evening Standard*, available at https://www.standard.co.uk/news/uk/post-office-court-of-appeal-royal-courts-of-justice-southwark-crown-court-high-court-b931471.html [accessed 26th October 2021].

and one which recognises the power of both state and private prosecutorial authorities.

However, *Hamilton* is, ultimately, a case about disclosure and investigation. Alongside the very real consequences to the people wrongfully prosecuted and convicted, there are lessons for lawyers—both doctrinal and, perhaps more importantly, ethical.

In *Hamilton*, the interplay between prosecutorial duties of disclosure and investigation is a recurring one. Often, failures to investigate go hand in hand with failures to disclose. In the court's consideration of the individual appeals, there is a close relationship between the two. For example, in the appeal of Barry Capon, the relevant data had been obtained and examined to consider giros, but not to consider bugs, errors or defects. There had also been uncertainty about whether that data had been disclosed in the original criminal proceedings. Therefore, considering this combination of failures, the court held that there was an abuse of process in both category 1 (impossibility of a fair trial)and category 2 (affront to public conscience).

However, the distinction deserves careful analysis. In the *Criminal Law Review*, Umar Azmeh's commentary on *Hamilton* summarises the judgment as finding 'a pervasive failure of investigation and disclosure that tainted each of the 39 convictions'.[2] Azmeh summarises the court's reasoning on the basis that 'POL's failures in investigation and disclosure clearly fell foul of the CPIA 1996, the relevant Code of Practice, and ECHR art 6, in each and every one of the 39 cases'.[3] Yet our analysis can, and should, be more precise that that. *Hamilton* illustrates that failures to investigate may, *independent of non-disclosure*, give rise to a successful argument based on abuse of process. In the appeal of William Graham, the prosecution had obtained the underlying data anddisclosed it to the defence as unused material. The defence expert had been able to evaluate it, challenging the accuracy of the Horizon system and raising the possibility of computer errors. Despite the defence expert's concerns, the prosecution had obtained no evidence to corroborate Horizon.

Here, in the prosecution of William Graham, the relevant failure was not one of disclosure. Rather, it was a failure to *investigate*: to subject the data of the Horizon system to scrutiny and to examine it for the relevant issues. Consideration of the individual appeals, therefore, reveals that practitioners should be careful to identify the specific kind of failure that they seek to raise, instead of simplifying the issues into a catch-all argument about disclosure. In some cases, then, it will be distinction with a difference.

Continued Lessons in Professional Ethics

Disclosure extends beyond the realm of a criminal trial. Barristers and solicitors must be careful in their own duties of professional disclosure and confidentiality, as the decision of *R v Felstead* [2021] 4 WLUK 533 shows. Two barristers had breached confidentiality by making improper disclosure of material relating to the *Post Office* appeals, providing further lessons in professional ethics for those practising in the modern era.[4]

[2] Azmeh, 'Abuse of Process: Hamilton v Post Office Ltd [2021] 8 Crim LR 684, 688.
[3] Azmeh, 'Abuse of Process: Hamilton v Post Office Ltd [2021] 8 Crim LR 684, 688.
[4] (29th April 2021) *Legal Futures*, https://www.legalfutures.co.uk/latest-news/contempt-threat-seriously-questionable-says-sub-postmasters-barrister
(2nd November 2021) *The Law Society Gazette*, https://www.lawgazette.co.uk/news/new-call-for-lawyers-to-be-probed-in-post-office-inquiry/5110366.article

Revised Guidelines and Code

The revised Attorney General's Disclosure Guidelines and CPIA Code of Practice came into force on 31 December 2020. Their introduction follows the Attorney-General's 2018 review of the effectiveness and efficiency of the disclosure system and builds on reforms already underway as part of the National Disclosure Improvement Plan (NDIP), jointly steered by the National Police Chiefs' Council, CPS and College of Policing.

The 2018 review concluded that the primary legislation governing disclosure in the criminal justice system remains fit for purpose but there are problems in practice across the entire system. These range from investigators not pursuing reasonable lines of inquiry, unmanageable volumes of material requiring consideration, prosecutors signing off poorly prepared unused schedules, inadequate defence case statements and lack of simple or clear guidance on disclosure to assist frontline investigators and prosecutors. At a macro level, the review identified the need for cultural change. The main drivers behind disclosure deficiencies included a "too strict" approach to the disclosure test, an enduring perception that disclosure is an inconvenient task or some approaching it as an afterthought.

Against this background, the new Guidelines do not represent an overhaul of the disclosure system. They instead set out to offer clearer guidance to investigators, prosecutors and defence practitioners on when material should be disclosed and why. There is less of a focus on the functions of particular disclosure system stakeholders and greater emphasis of the principles that apply. These include the need to balance the right to a fair trial against the right to family and private life, for disclosure to be approached in a "thinking" manner from the outset of a case and early engagement by defence as to the real issues in dispute. There are four key practical changes.

Practical changes

Presumptive categories

The 2018 review found that certain items will almost always assist the defence but frequently are not disclosed in the absence of a challenge. This drains time and resources. Paragraph 87 of the new Guidelines creates new categories of material that are presumed disclosable. Practically, this should not be mistaken for automatically disclosable, but the arrival of the categories should obviate the need for many disclosure applications and for prosecutors will assist in speeding up review.

Material presumed disclosable includes:

- Records from telephone calls containing descriptions of offence / offender e.g. 999 calls;
- Incident logs;
- Crime Reports / Investigation Logs: e.g. CRIS;
- Police notebooks / notes: e.g. of police / witness accounts;
- Records of police actions: e.g. house to house enquiries;
- CCTV / other imagery of incident
- Custody records;
- Previous accounts of complainants / witnesses;

- Interview records of actual or potential witnesses and suspects; and
- Material casting doubt on a witness or co-defendant: e.g. relevant previous convictions.

The list is reflected in paragraph 5.4 (which expressly refers to BWV whereas the above does not) and 6.6 of the revised Code. These items must be retained and listed on the schedule.

Disclosure Management Documents (DMDs)

Prepared by the prosecutor, a DMD sets out the strategy to disclosure and is designed to be a "living" document. They are now required in all Crown Court cases and may be prepared for Magistrates' Court case where particularly complex, there are linked proceedings, or the case concerns privileged material. The DMD should be approached with the defence case in mind and what could assist the defence even if unknown.

The DMD should address:

- The lines of inquiry that have been pursued
- The extent of examination of digital material – if a phone or other device was seized the DMD should set out whether it will be examined and when, if it is not going to be examined it should set out why not
- Any linked investigations
- Any potential video footage i.e., CCTV
- Any third party material and what is being done to obtain it

There should an initial DMD at the PTPH.

Pre-Charge Engagement (PCE)

Annex B to the new Guidelines provides for PCE, including disclosure of material that would meet the disclosure test in the event criminal proceedings were instituted, once a suspect has had a PACE interview but before they have been charged. PCE can be initiated by the suspect's representatives, prosecutor or investigator. It can entail:

- Giving the suspect the opportunity to comment on any proposed further lines of inquiry.
- Ascertaining whether the suspect can identify any other lines of inquiry.
- Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
- Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.
- Agreeing any key word searches of digital material that the suspect would like carried out.
- Obtaining a suspect's consent to access medical records.
- The suspect identifying and providing contact details of any potential witnesses.
- Clarifying whether any expert or forensic evidence is agreed.

Most advantageously, PCE could lead to the suspect not being charged in a situation where a suspect provides a steer on reasonable lines of inquiry that point away from their involvement but even where a suspect is charged can speed up the disclosure process as the issues in dispute are likely to already be known. If PCE is embarked upon, a full record of communications and information exchanged will be imperative.

Front loading disclosure

The new Guidelines emphasise early disclosure and the following references will assist in holding the prosecution to account.

In the Magistrates' Court where a not guilty plea is anticipated, initial disclosure and unused schedule should be served before the first hearing. Where a guilty plea anticipated but a not guilty is entered, it should be served as soon as possible after that: see paragraph 101 – 103.

In the Crown Court, it is encouraged as a matter of best practice for initial disclosure and unused schedule to be served prior to PTPH: see paragraph 104.

For more complex cases where this is not possible, there should be a phased approach and an initial DMD outlining the plan for disclosure: see paragraph 106.