

DISCLOSURE AND PII PROCEDURES

An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

In this article we attempt to give a short explanation of the recent history of disclosure and developments in Public Interest Immunity (PII) so that those facing the current regime(s) may better understand the reality of what is expected of them, and what they can hope to gain from the current processes. Disclosure of so-called unused material is often very important to Defendants who are very interested in knowing about material which the prosecution does not intend to use.

EARLY DAYS

In the early 1980s, the situation was simple, 'unused material' i.e. material the prosecution were not going to use, was made available to the defence if it was relevant. Sensitive material could be withheld and that decision was made by the prosecutor - not the Court. Then the early 1990's produced the first of the real watershed 'miscarriage' cases; *R v Ward* [1993] 1 WLR 619. The Court of Appeal laid down a more generous disclosure regime - all 'material' evidence was to be disclosed - i.e. "evidence which tends either to weaken the prosecution case or to strengthen the defence case." The Court found that where there was sensitive material the Crown should normally inform the defence and the Court would rule on the claim. This would be after an *ex parte* (private hearing) between the prosecution and the Judge. The case of the M25 three (*R v Davis, Rowe and Johnson* [1993] 1 WLR 613, 617) refined the PII regime. There were now 3 types of PII applications, the first two are still used today:

1. The first (and for most cases) is where the prosecution tell the defence about the PII application and what category of material it is about. The defence are then entitled to make their own representations to the Judge.
2. The defence are told about the application but not what category of material is involved as that would, in effect, reveal that which the Crown contend should be kept secret.
3. In exceptional cases, where even to reveal the fact that an *ex parte* application was to be made, could 'give the game away', then the *ex parte*, hearing could take place without notice to the defence.

This procedure was enshrined in statute in the Criminal Procedure and Investigations Act 1996 and the Rules made under the Act - though now in practice the Rules

are replaced by the new Criminal Procedure Rules, which largely replicates the old system. It is arguable that the 3rd procedure, the most severe has, despite being included in the new Rules, in fact been abolished by the House of Lords decision in *R v H & C* (see below).

CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996:

This is the Act which will apply in virtually all cases being prosecuted today. The Act though however is in two forms. If the criminal investigation commenced after 1st April 1997 but before 4th April 2005 then the CPIA test, in its original form, will apply. This introduced the concept of the prosecution disclosing any material which, in the prosecutor's opinion, might undermine the case for the prosecution. This is followed by the Defendant completing a Defence Statement where the Defendant sets out: 'in general terms the nature of the accused's defence.' Further disclosure, or 'secondary prosecution disclosure' is dependent on what is said in the Defence Statement; as is any hope a Defendant may have of influencing the outcome of any Public Interest Immunity application. The authors in a recent case actually named a suspected informant in a Defence Statement and it was revealed that in fact not only was the man an informant but had been paid by the police to inform. In some cases a different approach may be correct and great care is needed in drafting the all important Defence Statement.

CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 (AS AMENDED):

The Crown now have to begin the process by disclosing material 'which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the defence.' The defence are then under an obligation to serve a Defence Statement which is required to be much more detailed than previously.

R V H & C AND THE GOLDEN RULE

In the case of *Edwards and Lewis v UK* the European Court considered the *ex parte* PII procedures adopted in those cases violated the applicants' right to a fair trial (Article 6). The defence cases involved allegations of entrapment by the police and the Court felt that the *ex parte* process was not a fair way to deal with the issues as the Judges had to make findings of fact before decid-

ing upon disclosure. Those findings of fact were reached after hearing only one side - the prosecution. The answer, the Strasbourg Court suggested, might lie in the appointment of a 'special' or 'independent' counsel to argue the Defendant's case but who would be duty bound not to reveal the sensitive issues that he has heard about to the defence.

R v H & C [2004] 2 AC 134 was the first domestic case that successfully relied on the argument for special counsel (the authors represented H). The case eventually went to the House of Lords and a seven stage test was laid down for Judges considering disclosure and PII. This effectively limited the use of special counsel to exceptional cases only.

The Lords decided that the prosecution, and not the Courts, should primarily decide on issues of disclosure - i.e. a prosecutor will decide first of all if material is relevant and if isn't there is no need to disclose or see the Judge, never mind seek a PII ruling if the material is sensitive. This leads to the danger that the prosecution will simply decide that material which is sensitive is actually not relevant anyway and therefore, even if the defence have asked for disclosure of the same, the material is not disclosed and even the Court is excluded. The defence however still has a right to apply to the Court for disclosure and the Lords reminded the Crown that the starting point is the 'Golden Rule', i.e. that any material which weakened the prosecution case or strengthened that of the defence should be disclosed and that that rule should be read fairly widely. The Court however warned against Defendants attempting 'try-on' defences, i.e. making "general and unspecified allegations and then seeking far-reaching disclosure in the hope that material may turn up to make them good."

THE PROTOCOL

On 20th February 2006 a 'Protocol' on disclosure was published. Its aim was to set down clear guidance on how Judges and the parties to a criminal case should deal with the issue of disclosure of 'unused' material. It advocates a 'sea-change' in the approach to the handling and management of unused material. There was concern that too much was being disclosed which was leading to spiralling costs and lack of proper scrutiny. Much of what is in the Protocol is not new - but the repetition of the proper procedure will serve to remind prosecutors that they 'have to get it right' or the defence will be reminding the Judge of which paragraph of the Protocol the Crown have offended. For example there are police duties to gather and record unused material fairly and in accordance to the relevant Code of Practice, and to set out in a Schedule (usually called an MG6C) a list of all the non-sensitive unused material, and for that schedule to be sent to the prosecutor expeditiously. The Protocol also however underlines that the Crown can't simply comply with their disclosure duties by giving the defence 'every-

thing'. There must be a considered approach.

The Protocol does make it clear that many so called Defence Statements, up to now, have been so lacking in detail that they hardly qualify for the title. Now Judges are told that they have a duty to make sure Defence Statements are up to the mark and if not the Defendants can expect their juries to hear adverse comments about their defence, as well as affecting the prospects of any application for further disclosure. But the Protocol also reasserts the proper procedure for applications to the Court to order further disclosure. In fact, if done properly, the defence can use the system to, in effect, place a burden on the Crown. The defence apply to the Court for disclosure of the disputed material sending a copy of the application to the Crown. The Crown then have 14 days to agree to provide the disputed material or set out in writing their objections and attend Court. If they fail to reply in time the Court may decide the matter on paper - i.e. only reading the Defendant's argument (see para 44 of the Protocol). This system has in fact been in place for some time (Criminal Procedure Rules, r25) but widely ignored. Hopefully more defenders will now see how pressure can be kept up by using the rules/Protocol to their advantage. As usual it is simply a case of being pro-active, ensuring the Defence Statement is drafted carefully and using the legislation/ rules/ Protocols etc to keep the pressure on.

IN PRACTICE

What does all this mean? Disclosure and PII has always been a difficult topic and one that we are likely to have to re-visit after the first challenges to the new system have been settled. Basically the rule for all Defendants facing trial where disclosure is likely to be an issue is early preparation. The only way to maximise disclosure is to ensure that the Defence Statement is drafted fully and precisely. The document, now more than ever, has to be persuasive; i.e. if it does not persuade the prosecutor then it maybe the platform for representations to the Judge about the proper PII procedure, the Golden Rule, objective relevance and special measures, e.g. edited disclosure, special counsel and so on. As always early preparation is the key.

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