

Disclosure: Responsibilities of a Prosecuting Authority

Julie Norris

Kingsley Napley

A. Introduction

The rules of most professional disciplinary bodies are silent as to the duties and responsibilities vested in the regulatory authority to effect the disclosure of unused material to a registrant facing disciplinary proceedings.

Whilst any enquiry into the proper approach to disclosure in the jurisdiction of professional disciplinary tribunals requires an analysis of the criminal and civil disclosure regimes, given the fact that the majority of regulatory authorities do not use either the criminal or civil rules of procedure, it is neither possible nor desirable to directly import the statutory disclosure regimes from either of those two jurisdictions.

In *Rajan v GMC*,¹ the Privy Council (PC) considered the appropriate test to be applied by the regulator (in that case the GMC) to the question of the disclosure of unused material. In reviewing the common law authorities decided before the Criminal Procedure and Investigations Act 1996 (CPIA) came into force, the PC was of the view that the relevant test was relevance and materiality, rather than the regime established by the CPIA.

This paper seeks to provide some guidance to regulatory authorities as to the extent of the duties which may properly be said to exist and provides some practical suggestions as to how regulators may seek to comply with these obligations.

¹ [2000] Lloyd's Rep Med 153 at [17].

B. Disclosure in criminal proceedings

The rule in *Bryant and Dickerson*

The (civil) case of *Bryant and Dickinson*² is widely regarded as marking the starting point of the establishment of a formal process for the disclosure of material which may assist a defendant in criminal proceedings. Hitherto, disclosure was seen as an informal, professional activity left exclusively to the skill and integrity of counsel. The rule in *Bryant and Dickerson* was a narrow one, requiring the prosecution to supply details of any witness who could give material evidence; the duty did not extend to the provision of the statement itself.

Over the next 30 years or so, the courts' attitude to disclosure moved on dramatically from the rule in *Bryant and Dickerson* to the position whereby disclosure was seen as being about ensuring that the defendant received a fair trial; a presumption in favour of disclosure rather than the following of strict rules.

² [1946] 31 Cr App R 146.

Attorney General's Guidelines & 'unused material'

In 1981, formal (although non-statutory) guidelines were issued by the Attorney General³ stipulating what material should be disclosed to the defence, when and by whom. These Guidelines were to supplement the common law rights already established. The Guidelines defined for the first time the concept of 'unused material' as, inter alia, "witness statements and documents not included in the committal bundle" and unedited versions of the same. Disclosure was to be effected by the prosecutor if the unused material in their possession had "some bearing on the offence(s) charged and the surrounding circumstances of the case". The prosecutor was given the discretion of deciding when disclosure should be made in accordance with the Guidelines and when for example, one of the exceptions applied (as the material was 'sensitive' etc.); the court played no role in this exercise.

³ Attorney-General's Guidelines on Disclosure.

The decision in *Ward* and 'materiality'

The Guidelines were not to last long. In a series of cases over the next decade, the courts were heavily critical of the manner in which prosecutors were exercising their discretion under the Guidelines. The judgment of the Court of Appeal in *R v Ward*⁴ greatly expanded the scope of the prosecution's duty of disclosure, ⁵ widening it to include everything gathered by the prosecutors in the course of its investigation upon which it did not seek to rely:

"We would emphasise that "all relevant evidence of help to the accused" is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led." at 601

The Court had replaced the concept of unused material from the Guidelines with the test of materiality.

The Court of Appeal in *R v Keane*⁶ considered what evidence would be judged to be material:

"I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution:

(1) to be relevant or possibly relevant to an issue in the case;

(2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;

(3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

⁴ [1993] 2 All ER 577.

⁵ Ward also established that the decision as to what material was sensitive and hence could be legitimately withheld, was to become a question for the court (the concept of Public Interest Immunity), rather than the prosecutor.

⁶ [1994] 2 All ER 478.

The decision in *Brown* and credibility

In *R v Brown*⁷ the Court of Appeal concluded that the Crown was also under a duty to give disclosure of significant material which may affect the credibility of a prosecution witness and gave the following three examples of things that must be disclosed:⁸

- (a) A previous inconsistent statement. Copies of such statements should be given to the defence and it is submitted that it would not be sufficient to simply inform the defence of the existence thereof. Where the discrepancy relates to that part of a witness's evidence which is evidence against one defendant only, the statement should be supplied to any other co-defendant against whom the witness also gives evidence;
- (b) The fact that a reward has been requested by a prosecution witness; and
- (c) Previous convictions of prosecution witnesses or any other matter which is adverse to the character of a prosecution witness.⁹

The guidance in *Brown* was considered and approved on appeal to the House of Lords, in which Lord Hope stated that:

"...the investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses. Here again, the prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed. The question whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important "issues" in the case, although the material which bears upon it may be, as Steyn L.J. observed, at pp. 199 and 1607D, collateral." (Underlining added)

⁷ [1995] 1 Cr App R 191.

⁸ This is not an exhaustive list and is as paraphrased in Archbold 1995.

⁹ Archbold 1995 at [4-272-3].

Guidance on the extent of the duty

In *R v Saunders and others*¹⁰ the Judge at the court of first instance ruled that material including notes, tape-recordings and transcripts of interviews with witnesses or potential witnesses and first and subsequent drafts of the statements produced by such witnesses or potential witnesses or their legal advisers was disclosable.

In *R v Brown (Winston)*¹¹ the Court considered how oral statements received by the prosecution should be dealt with i.e. by making a note of the statement which would then, subject to materiality, be disclosable.

¹⁰ [1996] 1 Cr App R 463.

¹¹ [1995] 1 Cr App R 191, at [199 F-G].

The present (statutory) criminal test for disclosure

The present statutory criminal test for disclosure is an objective test requiring the prosecutor to disclose material which might reasonably be considered to be capable of undermining the case for the prosecution or assisting the case for the accused (Part V of the Criminal Justice Act 2003¹²).

¹² Which amended the Criminal Procedure and Investigations Act 1996.

C. Disclosure under the Civil Procedure Rules

Part 31 of the Civil Procedure Rules (CPR) deals with standard disclosure in civil jurisdictions. Part 31.6 provides that:

“Standard disclosure requires a party to disclose only –

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party’s case; or

(iii) support another party’s case; and

(c) the documents which he is required to disclose by a relevant practice direction”

D. DISCLOSURE IN PROFESSIONAL DISCIPLINARY TRIBUNALS

The existence of a duty

As noted above, most regulatory authorities are not required under their enabling legislation or rules made thereunder to undertake an exercise to determine what unused material in their possession falls to be disclosed to a registrant facing professional disciplinary proceedings.

The duty to disclose unused material to those facing regulatory proceedings exists both at common law and by virtue of Article 6 of the European Convention on Human Rights 1998 which place an obligation on the regulator to ensure that registrants receive a fair hearing.

The appropriate test

Absent a statutory (or other) obligation to conduct a disclosure exercise, regulatory authorities ought to give careful consideration to their disclosure obligations to ensure fairness and consistency in the way that registrants are treated. Some regulators adopt the civil rules of evidence and some the criminal and

accordingly, the test adopted may not be exactly the same for all regulatory authorities. Whatever test is used, the regulator should ensure that the defence are told about it and provided with the disclosable material sufficiently far in advance of the hearing so that they have a fair opportunity to consider it.

A test of materiality may be considered suitable for the vast majority of professional disciplinary regimes. From the common law authorities, the following definition of materiality may be extrapolated. Unused evidence can be said to be 'material' and therefore disclosable if it is:

- (a) Evidence which tends to either weaken the prosecution case or strengthen the defence case;
- (b) Evidence which on a sensible appraisal by the prosecution can be seen to be relevant or possibly relevant to an issue in the case;
- (c) Evidence which, on a sensible appraisal by the prosecution, can be seen to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
- (d) Evidence which, on a sensible appraisal by the prosecution, can be seen to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (b) or (c) above.

Ambit of disclosure exercise

Reviewing the common law authorities, it seems that the following ought properly to fall within the ambit of the disclosure exercise, if it is in the possession of the regulatory authority (see below on the ambit of the duty of enquiry):

Witness evidence

- Notes/recordings of interviews with witness and potential witnesses
- First and subsequent drafts of the statements produced by such witnesses or potential witnesses (if signed or otherwise adopted by the witness)
- Notes of any oral statements made to the regulator or other body in which the substance of the matters alleged against the registrant is discussed
- Emails and any other correspondence in which the substance of the matters alleged against the registrant is discussed
- Material relevant to the credibility of the witness, including material that relates to other complaints made by the witness where they might be material to the defence case
- Any exhibits/evidence provided by the witness not relied on by the regulator

Expert evidence

- Initial and any further instructions to the expert
- Correspondence with the expert in which the expert provides any opinions relevant to the substance of the matters alleged against the registrant

A review of this list highlights the importance for regulators of adopting a careful and methodical approach to the handling and storing of evidence in such cases, in particular ensuring a fastidious approach to the keeping of draft witness statements.

Record of disclosure

It is good practice for all decisions relating to disclosure to be recorded in a consistent manner. The form of the record will vary according to the requirements of the particular regime. An example disclosure log is provided at **Appendix 1**, which meets the essential requirements of such a tool: date of review, identity of document and reviewer and decision on disclosure. This is intended to be a living document and to be kept up to date during both the investigation and hearing stages of the case. If counsel is instructed for the hearing, a copy should be provided to them. The document is intended to be an internal log and (unless exceptional circumstances existed) need not be disclosed to the defence.

Timing of disclosure

Whilst recognising the ongoing duty of a regulatory authority to consider disclosure, it makes most sense for the lawyer with conduct of the case to conduct a full disclosure exercise at the point that the bundle of evidence upon which the regulator is seeking to rely at the final hearing is served. At this point, all material in the possession of the lawyers should be reviewed and a record of that exercise having been conducted, recorded in the log.

If at this stage, the registrant's defence is not known to the reviewing lawyer, this ought to be noted in the log and the exercise carried out again when more is known about the registrant's position vis-à-vis the allegations. Material that did not previously fall to be disclosed may become material once the defence is known.

Duty of search

If regulators use the services of external law firms, they need to ensure that the lawyers they instruct have all the papers in the case and not just those that formed the basis of the instruction to them. For example, the regulator may have corresponded directly with a witness on matters that are material to the allegations faced by the registrant. It is crucial that such documentation is provided to the lawyer conducting the disclosure exercise so that they can consider its materiality.

In most cases, it will be obvious what material the reviewing lawyer is required to look at in order to complete the disclosure exercise, for example, the case papers may be stored in a single file, or in a discrete area of an electronic case management system. However, there will be occasions, particularly in paper heavy or multi-handed cases, where the material in the possession of the regulator is not so readily identifiable. In those circumstances, what steps must be taken to search for evidence that may fall to be disclosed?

In the civil jurisdiction, the CPR deals with this question at Part 31.7, which provides as follows:

- (1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c).*

(2) *The factors relevant in deciding the reasonableness of a search include the following –*

- (a) the number of documents involved;*
- (b) the nature and complexity of the proceedings;*
- (c) the ease and expense of retrieval of any particular document; and*
- (d) the significance of any document which is likely to be located during the search.*

(3) *Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.*

The test of reasonableness seems an appropriate one for regulators to adopt (and adapt if necessary).

Duty of enquiry?

The position on whether there is a duty on a regulator to take steps to seek to obtain other evidence not in their possession which may be material, is far from straightforward; the jurisprudence from the different jurisdictions is divergent and unclear. Below, the key cases are set out before a suggested approach for regulators is advanced.

Common law (criminal, pre-CPIA 1996)

In **Ward** (a pre CPIA case) the Court of Appeal said this about the duty of enquiry incumbent upon the prosecution (in the context of receiving evidence from an expert):

“...That duty [of general disclosure] exists irrespective of any request by the defence. It is also not limited to documentation on which the opinion or findings of an expert is based. It extends to anything which may arguably assist the defence. It is therefore wider in scope than the rule. Moreover, it is a positive duty, which in the context of scientific evidence obliges the prosecution to make full and proper inquiries from forensic scientists in order to ascertain whether there is discoverable material. Given the undoubted inequality as between prosecution and defence in access to forensic scientists, we regard it as of paramount importance that the common law duty of disclosure, as we have explained it, should be appreciated by those who prosecute and defend in criminal cases. And, if difficulties arise in a particular case, the court must be the final judge.” At page 52

The decision in **Ward** seems to be a decision limited to its own facts and there is no other domestic common law authority to support a wider construction of this duty.

Common law (civil)

In the civil case of *In Re: Stakefields Midlands Ltd*,¹³ concerning a director's disqualification, the Court was asked to consider the extent of the duty of enquiry required of The Secretary of State for Business, Innovation and Skills. After considering the merits of the case, Newey, J concluded as follows:¹⁴

"It would be dangerous to lay down an absolute rule. However, it seems to me that neither article 6 of the European Convention on Human Rights, nor the Secretary of State's duty to act fairly, will normally extend to requiring the Secretary of State to obtain evidence or to ensure that investigations are undertaken."

¹³ [2010] EWHC 2518 Ch.

¹⁴ At [11-12].

European law

In *Jespers v Belgium*¹⁵ (a criminal case) the European Commission on Human Rights, considering the duty of enquiry incumbent upon a prosecuting agency stated:

"In short, Art. 6(3)(b) recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary 'facility'" (underlining added).

Common law (professional discipline)

In *R(Johnson) v NMC*¹⁶ the High Court considered, in light of *Jespers*, whether and if so to what extent a regulator was under a duty to gather evidence in favour of the practitioner as well as against him. Beatson, J held that there was *"no free-standing positive duty on the regulator to gather evidence in favour of the practitioner nor against him"* unless the Registrant was able to establish (albeit to a low standard) an inequality of arms.¹⁷

Beatson, J distinguished *Jespers* and gave reasons for his finding.¹⁸ Of particular relevance are the following:

- (a) The discussion in *Jespers* was in the factual context of a criminal prosecution and a proceeding criminal investigation by a body with coercive powers. It does not address the position of a prosecution with no such powers;

¹⁵ (1983) 5 EHRR CD 305, at [58].

¹⁶ 2008 EWHC 885.

¹⁷ At [68-9].

¹⁸ At [64-5]

- (b) **Jespers** concerned non-disclosure of material in the hands of the prosecutor, not material which it is said the prosecutor was under a duty to obtain;
- (c) The Commission was concerned in **Jespers** with equality of arms and that the duties of disclosure are a result of that principle;
- (d) That paragraphs 58 – 68 of the decision are fundamentally inconsistent with the submission that there is a free-standing duty on a prosecutor to obtain evidence and give it to the subjects of disciplinary proceedings. In these paragraphs the Commissioners deal with material (a report) initially unknown to the accused in that case. When it became known that the prosecutor had it, the accused did not seek it. In those circumstances the Commission held that there was no breach of Article 6(3)(b).

Whilst this decision makes it clear that there is a limit on the extent of the duty placed on the regulator to obtain material in favour of a registrant, its use is otherwise limited. Beaston, J did not clarify precisely *what* is required of the regulator with regard to the duty of enquiry, nor what was meant by an inequality of arms.

In **Dombo Beheer v Netherlands**¹⁹ the European Court of Human Rights considered what was meant by *equality of arms*. The court stated that an equality of arms was akin to a “*fair balance*” between the parties” and was applicable in civil cases as well as to criminal ones. The court went on to explain that:

“...as regards litigation involving opposing private interests, “equality of arms” implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.” (Underlining added)

¹⁹ 1993 18 EHRR 213.

Suggested approach to requests for documents not in the regulator’s possession

As a general rule, a regulatory authority has no obligation to seek out material that may assist a registrant in his or her defence.

How then should regulators respond to requests from registrants for the regulator to provide assistance in obtaining such material? The follow staged process may be a useful starting point:

1. Is there an inequality of arms? Relevant factors might include:
 - a. Is the registrant unrepresented;
 - b. Is the registrant represented by someone who is not legally qualified;
 - c. Does the registrant have limited funds to pay for a lawyer i.e. is he able to afford representation at the hearing itself but unable to pay for a lawyer to chase down material from third parties and unable for whatever reason to do this for himself;

- d. Does the regulator have any coercive powers; can the registrant access these;
 - e. What evidence is there that it is practically more difficult/prohibitive for the registrant or his representatives to conduct the necessary enquiries for themselves;
 - f. What steps has the registrant taken herself / himself? What was the outcome;
 - g. What difficulties will the registrant encounter without the information that he seeks and without any method of obtaining that information;
2. If no, it is appropriate to decline to assist, setting out detailed reasons;
 3. If yes, consider the resource implications for the regulator in terms of making the necessary enquiries. If not disproportionate, assistance should be offered.