Case No: 201502254-63 C5

Neutral Citation Number: [2015] EWCA Crim 1941
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2015

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISON
(SIR BRIAN LEVESON)
LORD JUSTICE GROSS
and
LORD JUSTICE FULFORD

- -

Between :

	The Crown	**Appellant**
	- and -	
	R & Others	**Respondent**

- -

(Transcript of the Handed Down Judgment.
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Hearing dates : 19, 20, 21 October 2015

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Judgment**Sir Brian Leveson P : :**

1. This is a series of extracts from the judgment of the court to which each of the members of the constitution has made a substantial contribution. The full judgment may not be reported until the conclusion of the trial because of the restrictions on reporting proceedings of this type: these provisions are contained within s.71 of the Criminal

Justice Act 2003. However, because important issues of practice are involved, we have lifted the restrictions in part to enable publication of the following extracts in order to give guidance on the proper approach to disclosure and abuse of process. Identifying features of the case have been removed. As a result the relevant part of the judgment may be reported prior to the conclusion of the trial, albeit in this anonymised form.

Introduction

2. Writ large throughout this case is the ability of the criminal justice system fairly to manage cases (likely, in the main, to encompass allegations of very substantial fraud) which comprise or comprehend a vast electronic database through the techniques of disclosure which have been developed through the Criminal Procedure and Investigations Act 1996 ("the CPIA") and the various protocols and guidelines which have been issued in an attempt to do so. Thus, it is common ground that, in this prosecution, many computers have been seized containing some 7 terabytes of data. The prosecution case has long since been served, as have prosecution case summaries, updated as time has passed. For five years, however, while proceeding in the Crown Court, the case has not progressed beyond what has been contended is necessary for primary disclosure. Neither has this state of affairs come about for want of judicial intervention.

3. 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. … This is an application by the prosecution 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.

4. In the light of the issues as to the extent of the present operation of the law relating to disclosure in cases of this type, we invited the Attorney General to intervene: he did so and we are grateful for the assistance that [has been] provided. Furthermore, because of concerns expressed about the impact of decisions of the Legal Aid Agency in relation to the case, we also invited representations and received submissions from that quarter. In the event, it quickly became clear that decisions as to legal aid had not, in fact, had any impact on the conduct of the case and we deal with such issues only very briefly.

The Law Relating to Disclosure

5. The prosecution has long been under a duty to disclose to the defence any unused material in its possession, that is to say material that is not part of its formal case against the defendant, which either weakens its case or strengthens that of the defendant. The central importance of proper disclosure of unused material was underlined by Lord

Bingham in *R v H* [2004] UKHL 3, at paragraph 14:

> "Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made."

6. This duty was put on a statutory footing in section 3(1)(a) Criminal Procedure and Investigations Act 1996 ("CPIA") which provides a single test for disclosure and requires the prosecution to:

> "…disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused."

7. "Prosecution material" is defined in section 3(2) as material:

> (a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
>
> (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.

8. The scheme of the statute proceeds in stages; the primary disclosure required by section 3 is intended to be followed by the service of a defence statement setting out the nature of the accused's defence, including any particular defences on which he intends to rely, and indicating the matters of fact on which he takes issue with the prosecution (section 6A CPIA). Where the prosecutor has complied, or purported to comply with section 3, and the defendant has been charged with an indictable offence, the service of a defence statement is compulsory (section 5(1), (5) CPIA).

9. Disclosure of unused material does not end there. Once the defence statement has been served, the defendant may make an application for specific disclosure under section 8 CPIA of any material which he has reasonable cause to believe should have been disclosed pursuant to section 3. Moreover, the prosecution is under a "continuing duty of disclosure", pursuant to section 7A, which requires it to keep under review the question of whether at any given time there is material which satisfies the test in section 3.

10. As noted in *R v H* [2004] at paragraphs 17 and 35, section 3 does not require the prosecutor to disclose material which is either neutral or adverse to the defendant; self-

evidently, a defendant cannot complain of non-disclosure of material which would lessen his chances of acquittal. More than that, prosecutors have been consistently discouraged from disclosing material that they are not obliged to disclose, not least to avoid over-burdening and distracting the trial process with unnecessary materials.

11. The legislation does not prescribe the method of disclosure, or the process to be adopted by the prosecution; rather it is focussed on the end result: disclosure which complies with section 3. There is however an ample framework of law and guidance, now to be found in the *Criminal Procedure Rules* ("CrimPR"), the *CPIA Code of Practice 2015* ("the Code"), the *Attorney General's Guidelines on Disclosure 2013* ("the 2013 Guidelines") and the *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases, December 2013* ("the Protocol"), the latter incorporating recommendations contained within the *Review of Disclosure in Criminal Proceedings*, September 2011, conducted by Gross LJ ("the Review"). For present purposes, nothing turns on the amendments to these various sources post-dating the events with which we are concerned.

12. These materials offer amplification of what the CPIA actually requires, and what would go beyond that. They serve as guidance for the operation of the statutory regime, and how the prosecution ought to go about its task. For present purposes, it is crucial to examine the guidance provided in relation to cases such as this where the unused material is made up of vast quantities of electronic files which would, realistically, be impossible to read and assess in the usual way. How is the prosecution to comply with its obligation under section 3 if it has not read – and could not be expected to read – all the material it has seized? In order to deal with this question it is worth setting out the framework in detail.

13. The scene is set by the Criminal Procedure Rules, underlined by Gross LJ at paragraph 31 of his Review:

> "The Rules now consolidate the Court's case management powers and furnish a guide to the underlying culture intended to govern the conduct of criminal trials. Accordingly, the Rules are or should be of the first importance in the proper application of the disclosure regime."

14. In particular, Rule 3.2 imposes a duty on the Court to further the overriding objective "by actively managing the case" which includes "the early identification of the real issues". Rule 3.11(a) requires the Court to establish, with the active assistance of the parties, what disputed issues they intend to explore.

15. Into that picture fits the Code of Practice, required by section 23(1) CPIA**,** the latest iteration of which records in the Preamble its purpose to set out "the manner in which

police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant to the investigation, and related matters". Most notably, the Code sets out the procedure for dealing with relevant prosecution material. First, paragraph 2.1 defines material as relevant if:

> " …it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case."

16. The Code goes on to provide (at paragraph 6.2) that:

> "Material which may be relevant to an investigation, which has been retained in accordance with this code, and which the disclosure officer believes will not form part of the prosecution case, must be listed on a schedule."

17. Scheduling is dealt with in detail (at paragraphs 6.9 – 6.11):

> "6.9 The disclosure officer should ensure that each item of material is listed separately on the schedule, and is numbered consecutively. The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed.
>
> 6.10 In some enquiries it may not be practicable to list each item of material separately. For example, there may be many items of a similar or repetitive nature. These may be listed in a block and described by quantity and generic title.
>
> 6.11 Even if some material is listed in a block, the disclosure officer must ensure that any items among that material which might satisfy the test for prosecution disclosure are listed and described individually."

18. Paragraph 7.1 provides for the disclosure officer to give the schedules to the prosecutor, where practicable, at the same time as giving him the file containing the material for the prosecution case. Paragraph 7.2 provides for the disclosure officer to draw the prosecutor's attention to any retained material which may satisfy the test for prosecution disclosure under the CPIA. Neither the statute nor the Code requires the disclosure of

schedules to the accused by the prosecutor; however this has become a requirement in practice for the sake of transparency and in order to command the confidence of the court and the defence that the prosecution has taken the correct approach to disclosure.

19. We now turn to the Attorney General's Guidelines on disclosure of unused material in criminal proceedings and the iteration issued in April 2005. As noted in the Foreword, the Guidelines urged that the disclosure process should not be abused:

> "Prosecutors must not abrogate their duties under the CPIA by making wholesale disclosure in order to avoid carrying out the disclosure exercise themselves. Likewise, defence practitioners should avoid fishing expeditions and where disclosure is not provided using this as an excuse for an abuse of process application."

20. The following provisions were intended to assist with the operational approach to paragraphs 6.9 – 11 of the Code of Practice:

> "26: … Disclosure officers, or their deputies, must inspect, view or listen to all relevant material that has been retained by the investigator, and the disclosure officer must provide a personal declaration to the effect that this task has been undertaken.

> 27: Generally this will mean that such material must be examined in detail by the disclosure officer or the deputy, but exceptionally the extent and manner of inspecting, viewing or listening will depend on the nature of material and its form. For example, it might be reasonable to examine digital material by using software search tools, or to establish the contents of large volumes of material by dip sampling. If such material is not examined in detail, it must nonetheless be described on the disclosure schedules accurately and as clearly as possible. The extent and manner of its examination must also be described together with justification for such action."

21. In the Review, Gross LJ drew careful attention to the fact that the 2005 Guidelines did not adopt the approach contained in paragraph 9 of the 2000 Guidelines, often termed "the keys to the warehouse"; in those earlier Guidelines, as summarised in Disclosure in Criminal Proceedings by Corker & Parkinson*:*

> "The solution to this problem… was that if the unused material was too large to inspect and schedule as required by paragraph 6 of the Code, but

> the possibility that it contained disclosable material could not be eliminated, then not to inspect and schedule but instead to permit the defence controlled access to it. Thus responsibility for ascertaining whether it contained anything of relevance was transferred to the defence…"

22. The later Guidelines issued in 2011 were designed to supplement paragraph 27 of the 2005 version and to meet the rise in investigations where very large volumes of electronic material were found. They are expressed in these terms:

> "2. ….The objective of these Guidelines is to set out how material satisfying the tests for disclosure can best be identified and disclosed to the defence without imposing unrealistic or disproportionate demands on the investigator and prosecutor.
> 3. The approach set out in these Guidelines is in line with existing best practice, in that:
> (i) Investigating and prosecuting agencies, especially in large and complex cases, will apply their respective case management and disclosure strategies and policies and be transparent with the defence and the courts about how the prosecution has approached complying with its disclosure obligations in the context of the individual case; and,
>
> (ii) The defence will be expected to play their part in defining the real issues in the case. In this context, the defence will be invited to participate in defining the scope of the reasonable searches that may be made of digitally stored material by the investigator to identify material that might reasonably be expected to undermine the prosecution case or assist the defence."

23. Paragraphs 39 to 45 set out the new guidance on the topic of sifting and examination as prescribed by paragraphs 6.9 – 11 of the Code. In particular:

> "41. … It is not the duty of the prosecution to comb through all the material in its possession – e.g. every word or byte of computer material – on the look-out for anything which might conceivably or speculatively assist the defence.
>
> 42. In some cases the sift may be conducted by an investigator/disclosure officer manually assessing the content of the computer or other digital material from its directory and determining which files are relevant and should be retained for evidence or unused material.
>
> 43. In other cases such an approach may not be feasible. Where there is an

> enormous volume of material it is perfectly proper for the investigator/ disclosure officer to search it by sample, key words, or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers.
>
> 44: In cases involving very large quantities of data, the person in charge of the investigation will develop a strategy setting out how the material should be analysed or searched to identify categories of data. Where search tools are used to examine digital material it will usually be appropriate to provide the accused and his or her legal representative with a copy of reasonable search terms used, or to be used, and invite them to suggest any further reasonable search terms. If search terms are suggested which the investigator or prosecutor believes will not be productive – for example because of the use of common words that are likely to identify a mass of irrelevant material, the investigator or prosecutor is entitled to open a dialogue with the defence representative with a view to agreeing sensible refinements. The purpose of this dialogue is to ensure that reasonable and proportionate searches can be carried out."

24. The 2013 Guidelines replace both the 2005 and 2011 versions, with the text of the latter being contained in an Annex. The 2013 Guidelines are intended to operate alongside the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases. These emphasise (at paragraph 3):

> "Properly applied, the CPIA should ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources. Consideration of disclosure issues should be an integral part of a good investigation and not something that exists separately."

25. Thus, the Guidelines again confirm the important role of the defence statement at paragraph 9. While the expression "dip sample" used in the 2005 Guidelines no longer appears, the 2011 Guidelines reproduced in the Annex still provide for the use of sampling where it would be impossible to manually read and assess the material. Given the continuing duty on the prosecutor under s.7A CPIA to keep disclosure under review, it may be necessary to carry out sampling and searches on more than one occasion: 2013 Guidelines, Annex A, at para.A44. Be that as it may, it is plain that the 2013 Guidelines contemplate the prosecutor, *at the stage of initial disclosure*, making use of appropriate sampling or the use of appropriate search tools.

26. We turn now to the Protocol prepared following the recommendations of Gross LJ in his Review. These take account of the 'Further review of disclosure in criminal proceedings: sanctions for disclosure failure' prepared by Gross and Treacy LJJ which

was published in November 2012. At paragraph 3 it makes clear:

> "… [It is] essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material or by misconceived applications. Although the drafters of the Criminal Procedure and Investigations Act 1996 ('CPIA 1996') cannot have anticipated the vast increase in the amount of electronic material that has been generated in recent years, nevertheless the principles of that Act still hold true. Applications by the parties or decisions by judges based on misconceptions of the law or a general laxity of approach (however well-intentioned) which result in an improper application of the disclosure regime have, time and again, proved unnecessarily costly and have obstructed justice. As Lord Justice Gross noted, the burden of disclosure must not be allowed to render the prosecution of cases impracticable."

27. Picking up one of the recommendations in the Review, the Protocol provides at paragraph 39:

> "The legal representatives need to fulfil their duties in this context with care and efficiency; they should co-operate with the other party (or parties) and the court; and the judge and the other party (or parties) are to be informed of any difficulties, as soon as they arise. The court should be provided with an up-to-date timetable for disclosure whenever there are material changes in this regard. A disclosure-management document, or similar, prepared by the prosecution will be of particular assistance to the court in large and complex cases."

28. Finally, it concludes at paragraph 56:

> "Historically, disclosure was viewed essentially as being a matter to be resolved between the parties, and the court only became engaged if a particular issue or complaint was raised. That perception is now wholly out of date. The regime established under the Criminal Justice Act 2003 and the Criminal Procedure Rules gives judges the power – indeed, it imposes a duty on the judiciary – actively to manage disclosure in every case. The efficient, effective and timely resolution of these issues is a critical element in meeting the overriding objective of the Criminal Procedure Rules of dealing with cases justly."

29. It is appropriate to conclude this review of the guidelines and protocol by referring to the Review (at paragraph 156) which is in these terms:

> "First, in a good many cases it needs to be recognised that it is

> likely to be physically impossible or wholly impractical to read every document on every computer seized. It follows that there can be nothing objectionable to search enormous volumes of material by the use of sampling, key words or other appropriate search tools; indeed, there is no other way and full use should be made of such tools. The [2005] Guidelines [at para. 27] and, more especially, the 2011 Guidelines [at paras. 41 *et seq*] deal in terms with such an approach……

30. Neither is it necessary solely to refer to the Rules or attempts to identify or prescribe practice for the authorities also confirm this approach. In *R v Brendan Pearson and Paul Cadman* [2006] EWCA Crim 3366, complaint was made that the Crown had failed to comply with its duty of disclosure in relation to records contained on computers which had been seized from the business under investigation. The police had not read every record contained on the computers. The complaint was rejected. Giving the judgment of the Court, Hughes LJ (as he then was) said this (at paragraph 20):

> "In the course of evidence given during the trial on a *voir dire*, a computer expert instructed on behalf of the appellant, when asked how long it would take to read all the computer material that the police had seized, said that it would take a lifetime or more. If the submission is made that it was the duty of the Crown to trawl through every word or byte of this material in order to see whether any of it was capable of undermining the Crown's case or assisting that of the appellant, we do not agree…..Where there is an enormous volume of material, as there was here, it is perfectly proper for the Crown to search it by sample or, as here, by key words…"

Hughes LJ went on to add at paragraph 22 that where sampling of voluminous material was undertaken "…it is the more important that it is explained exactly how it has been done and what has not been disclosed as a result". These were telling observations.

Summary of the Principles

31. As observed in the Review at para. 8 (i) (and later reaffirmed in the Protocol):

> "It is essential that the burden of disclosure should not render the prosecution of economic crime impractical. "

This concern is of the first importance and looms large in our thinking throughout. Whatever its cause, the debacle that has been the present case (with five years of litigation not reaching the stage when the indictment has been put) must not be repeated. As the Review went on to say (at paragraph 8 iii): "The tools are available; they need to be used." The issue confronted in the present proceedings goes to the application of these tools in cases with vast quantities of electronic materials, the scale of which has

already been described elsewhere in this judgment.

32. From the provisions and material outlined above, it is possible to draw a number of conclusions about the current law and practice on the disclosure of unused material.

- The prosecution is and must be in the driving seat at the stage of initial disclosure

33. The CPIA so provides and considerations of practicality demand it. It must be emphasised that at this stage, the true issues in the case may yet be unclear. It is no accident that the statutory scheme places the responsibility for determining whether material falls to be disclosed under section 3 CPIA on the prosecution.

34. In order to lead (or drive) disclosure, it is essential that the prosecution takes a grip on the case and its disclosure requirements from the outset. To fulfil its duty under section 3, the prosecution must adopt a considered and appropriately resourced approach to giving initial disclosure. Such an approach must extend to and include the overall disclosure strategy, selection of software tools, identifying and isolating material that is subject to legal professional privilege ("LPP") and proposing search terms to be applied. The prosecution must explain what it is doing and what it will not be doing at this stage, ideally in the form of a "Disclosure Management Document". This document, as recommended by the Review and the Protocol, is intended to clarify the prosecution's approach to disclosure (for example, which search terms have been used and why) and to identify and narrow the issues in dispute. By explaining what the prosecution is – and is not – doing, early engagement from the defence would be prompted. Plainly such an approach requires early and careful preparation from the prosecution, tailored to the needs of the individual case. This approach is now embodied in the process for document heavy cases forming part of the Better Case Management ("BCM") initiative. Moreover, it is reflected in the approach to "initial disclosure" (see further below) adopted by the Serious Fraud Office, as helpfully summarised in the respondents' Focused Response (at paragraphs 20 - 22).

- The prosecution must then encourage dialogue and prompt engagement with the defence

35. As is clear from the Rules, the duty of the defence is then to engage with the prosecution and thus assist the court in fulfilling its duty of furthering the overriding objective. It is plain that compliance with the test for initial disclosure calls for analysis of the likely cases of prosecution and defence. Absent such analysis, it would not be possible to form a view, even at this stage, of which materials would and which would not undermine the case for the prosecution and/or assist the case for the accused.

- The law is prescriptive of the result, not the method.

36. This is particularly relevant in respect of case such as this where the prosecution has recovered vast volumes of electronic material. In our judgment, it has been clear for some time that the prosecution is not required to do the impossible, nor should the duty of giving initial disclosure be rendered incapable of fulfilment 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: we strongly endorse the approach adopted in *Pearson (supra)* and that contained in the extracts from the 2013 Guidelines to which we have referred.

37. The extent of the duty imposed on the prosecution at this stage, while obviously fact specific, must take account that it is initial disclosure with which the prosecution is then concerned. The right course at the stage of initial disclosure is for the prosecution to formulate a disclosure strategy, canvass that strategy with the Court and the defence and to utilise technology to make an appropriate search or conduct an appropriate sampling exercise of the material seized. That searches and sampling may subsequently need to be repeated (to comply with the prosecutor's continuing duty of disclosure under s. 7A CPIA or to respond to reasoned requests from the defence under s.8) is neither here nor there; the need for repeat searches and sampling does not invalidate the approach to initial disclosure involving such techniques. The problem of vast quantities of electronic documents has, in a sense, been created by technology; in turn, appropriate use must be made of technology to address and solve that problem.

38. The prosecution's duties of record keeping and scheduling must likewise reflect the reality that not every one of perhaps many millions of e-mails is to be individually referenced. Thus, the 2013 Guidelines, at Annex A, paras. 45 – 46, reflecting the Code of Practice, qualify the requirement to keep a "record or log" of all digital material seized and subsequently retained as relevant to the investigation in cases "involving very large quantities of data"; in such cases, the obligation is to make a record of the "strategy and the analytical techniques used to search the data". Similarly, the scheduling duty imposed on the disclosure officer separately to list each item of unused material (as contained in the Code) is modified in favour of "block listing" – albeit that it remains the prosecution's duty to list and describe separately "the search terms used and any items of material which might satisfy the disclosure test": 2013 Guidelines, Annex A, at para. A50.

- The process of disclosure should be subject to robust case management by the judge, utilising the full range of case management powers.

39. Though decisions are for the prosecutor, such decisions or prosecution failures are not beyond challenge or somehow immune from the court's case management powers.

[Counsel] for the Attorney General, supported by [counsel for the prosecution], sought to advance the proposition that, at the stage of initial disclosure, judicial powers of case management were (in essence) limited to exhortatory observations or guidance; the danger otherwise was that case management powers, as contained in the Rules, would cut across the CPIA scheme. At the stage of initial disclosure, [it was submitted that]:

> "It should not be for the judge to be devising the disclosure scheme ….when the issues haven't been identified."

40. We are wholly unable to accept these submissions. As [counsel for the first defendant] aptly put it, the effect of those submissions would be to marginalise the judge's case management responsibilities as they apply at the stage of initial disclosure and would appear to exclude the power of the judge to enforce case management directions then made (or which the Judge would otherwise wished to have made).

41. In our judgment, the judicial task of active and robust case management is emphatically not confined to the secondary or subsequent stages of disclosure. The tenor of the Rules is quite to the contrary. So too are the various authorities, stretching back to *R v Jisl* [2004] EWCA Crim 696. Faced, for example, with a manifestly flawed, inadequate or inappropriate prosecution approach to initial disclosure, a judge is not constrained to limit intervention to exhortation and some veiled warning as to later consequences. The court is both entitled and obliged to give orders and directions to address the failing with which it is confronted. Neither is the judge required to watch the case become diverted from its proper course, powerless to stop it doing so until much time and costs have elapsed. The wording of s.3 was not intended to give the prosecution *carte blanche* to under-perform and, as experience has shown, prosecution failures in this area are of real concern: see, the Further Review conducted by Gross and Treacy LJJ, referred to above.

42. [Counsel for the Attorney General] relied on Crim PR Rule 3.5(1) which sets out the court's case management powers is in these terms:

> "In fulfilling its duty under rule 3.2 the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation, including these Rules."

43. Referring to the obligations of the prosecution in relation to primary disclosure as described in CPIA, he emphasised the final words and argued that the exercise of case management powers at this stage would be "inconsistent with legislation". That approach, however, is to misunderstand the simple principle that the Crim PR cannot override primary legislation. The language of Crim PR Rule 3.5(1) does not begin to restrict the panoply of the case management powers available to the judge at the initial disclosure stage. What the judge needs to do is to have regard to the context of the

legislation in exercising those powers.

44. Thus, in the context of initial disclosure, it is incumbent on the judge to consider the obligations of the Crown at that stage, bearing in mind the difficulties (where such exist) of ascertaining the real issues in advance of a defence statement. Moreover, when exercising case management powers at this early stage, it is critical for the court to have regard to the structure of the CPIA scheme – initial disclosure (s.3), followed by a defence statement (s.5), the facility thereafter for a reasoned application by the defence for further disclosure (s.8) and the prosecutor's continuing duty to disclose (s.7A). It should also be plain that, when making case management orders at the stage of initial disclosure, a judge should take care not to subvert the statutory scheme by confusing or conflating the various stages in the process.

45. In seeking to constrain judicial case management at the stage of initial disclosure, counsel for the prosecution placed considerable reliance on the decision of this court in *R v M (Michael)* [2003] EWCA Crim 3764 and, in particular, the following passage in the judgment of Auld LJ:

> "49. ….. There is no power in the court to direct primary disclosure, and, even if there were, it is difficult to see how the court could approach its task without knowledge of what, if any, issues were going to be taken with the prosecution case. The scheme of the Act is to rely on the prosecutor at that stage to disclose to the defence any unused material which in his or her opinion might undermine the prosecution case, but not to disclose everything available regardless of any conceivable relevance.
>
> 50. The machinery for testing the objectivity and adequacy of that disclosure, given the prosecution's incomplete knowledge at that stage of what issues lie ahead, is the scheme of secondary disclosure. Once those issues are identified by the defence in a defence statement, if they are so identified, the prosecutor can then revisit his duty of disclosure, better informed than he was at the primary stage, to form a view as to what further disclosure justice requires in the form of material that might reasonably be expected to assist the defence. If, in the light of his then knowledge, he still does not make adequate disclosure, that is when the court can step in, and stay in. It can then consider the material for itself and direct further disclosure if it considers justice requires it.
>
> 51. That is the machinery, and that machinery was invoked here over a number of applications in the course of the trial; and the judges, true to the scheme of the Act, ruled as they did……"

46. Properly analysed, we do not think that *Michael* assists the appellants. The issue in that case concerned a complaint that the prosecution had not gone beyond the requirements of ss. 3 and 8 CPIA and was firmly rejected, *a fortiori*, absent defence statements. To the extent that Auld LJ referred to there being "no power" in the court to "direct primary disclosure", that observation was *obiter* and, with respect, in the context of recent developments in the law, must now be read subject to the increased emphasis on case management. Furthermore, although Auld LJ's summary of the manner in which the CPIA scheme generally works is entirely right, his judgment (at paragraph 50) should not be read as confining judicial intervention exclusively to the "secondary" stage of disclosure. In leaving this point, we note too that the Review did not receive any representations from any consultee suggesting limitations at the initial disclosure stage of the judge's case management powers.

47. That said, when exercising those powers, the judge must, of necessity, keep well in mind that he is then concerned with *initial* disclosure, with the corollary 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 sections 7A and 8 CPIA.

48. For its part, the respondents underlined that, whereas ss. 5, 6, 7A and 8 CPIA spoke of the situation when the prosecutor has complied or "purported to comply" with his obligations in question, the terms of s.3 simply provided for the prosecution to give initial disclosure – and said nothing about the prosecutor "purporting" to comply with this obligation. Too much should not be made of this point. First, in context, compliance with the prosecutor's duty under s.3 must mean substantial compliance. Realistically, it cannot be supposed that cases will never proceed beyond the stage of initial disclosure merely because some documents have not yet been disclosed. A search for perfection in this area is likely to be illusory. Secondly, both ss. 5 and 6 provide for a defence statement to be given not only when the prosecutor has complied with s.3 but also when he has purported to comply with it. Progress can and should thus be made, even where it is or may be apparent that further prosecution disclosure might be required in the future. It also follows that cases are not doomed to proceed in compartmentalised, consecutive stages; 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.

- <u>Flexibility is critical</u>

49. Both the review and all other source materials on disclosure emphasise that it is not to be conducted as a "box-ticking" exercise; see too, *R v Olu* [2010] EWCA 2975; [2011] 1 Cr. App. R. 33, at [42] – [49] and *R v Malook* [2011] EWCA Crim 254; [2012] 1 WLR 633. 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. That must certainly be preferable to dealing with the matter in a mechanistic and unthinking way.

50. There is also no reason in this regard 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. If this proviso is overlooked, the real danger is that an apparently attractive "shortcut" will turn out to be a dead-end, leaving all concerned bogged down in satellite litigation over initial disclosure.

51. Properly applied, the application of these principles will keep the case within the statutory scheme, hold the parties to their duties thereunder and ensure that the proceedings are dealt with fairly, efficiently and expeditiously, in accordance with the overriding objective enshrined in the Rules.

52. Another matter, relevant to the present case ought conveniently to be mentioned here. While it is right that attention must be paid to the format of the material supplied (see the Review, at para. 159), it is no part of the prosecution's duty under s.3 to improve the material seized.

53. Before leaving this part of the case, three other issues must be addressed. The first is to underline one of the "Overarching Principles" set out in the Review of Efficiency in Criminal Proceedings (2015). The principle is "getting it right first time" and its relevance to the present case arises from the fact that the appellant's stance before this court is substantially different from that adopted before [the trial judge]. Before the judge (as discussed in further detail below), the appellant essentially acquiesced in the judge's proposals as to disclosure. The appellant's case below was that, with more time, they could and would comply with the requirements canvassed with the parties by the judge. On appeal, the case is that those proposals were misconceived with regard to the stage of initial disclosure, imposed upon them under protest and led the parties and the case onto the wrong road.

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.

55. The second issue concerns the question of a preparatory hearing. As we have noted, this does not appear to be a case where the approach of the judge was imposed upon an unwilling party. The question does, however, arise as to what can be done to challenge an order made in a pre-trial hearing by a judge where, if the parties are left to a post-trial appeal and the judge turns out to have been wrong, the trial will have proceeded on a false footing, delay can be measured in terms of years and the costs in millions of pounds. Such considerations lead naturally to an inquiry as to whether a preparatory hearing could or should have been sought in this case, pursuant to s.29 of the CPIA. Had there been a preparatory hearing and had there been a dispute as to the approach in law to disclosure favoured by the judge, it could have been challenged by way of appeal from such a hearing rather than many years later by way of an appeal arising from the decision to stay proceedings; it is inherently likely that any such appeal would (or certainly could) have been brought to this court some years earlier.

56. It is plain from their responses to us that the parties did not even consider asking for a preparatory hearing. Additionally, the respondents submitted that a preparatory hearing would have done no good, given the very late change in the appellant's case as to disclosure; on the face of it, there is force in this submission though it is very possible that an earlier appeal by way of that route might have brought about an earlier change in the Crown's approach.

57. The observations which follow therefore look to the future rather than to the present case. In general, parties are discouraged from seeking preparatory hearings. In *R v I-I* [2009] EWCA Crim 1793; [2010] 1 WLR 1125, Hughes LJ (as he then was) observed, at [21] – [22], that given the "co-extensive powers of case management outside the preparatory hearing regime", courts ought to be "very cautious" about directing such a hearing. The mere desire of one party to test a ruling by interlocutory appeal was not a good enough reason for doing so unless the point was one of the few "…genuinely suitable for that procedure and there is a real prospect of such appeal being both capable of resolution in the absence of evidence and avoiding significant wastage of time at the trial". The case then before the court was, however, one of those few; the point was:

> "….discrete, novel, certain to arise rather than hypothetical or contingent, involved no factual dispute and needed authoritatively to be determined lest the trial proceed on what might turn out to be a false footing, with consequent risk of the necessity of retrial".

58. We are bound to agree that preparatory hearings should be very few and very far between. Were it otherwise, a glut of interlocutory appeals would overload this court and timetables, both for the proceedings in question and other appeals, would be subject to serious disruption. In an exceptional case, however, where there is essentially a discrete dispute of law (not fact) as to the approach to be followed by way of disclosure, consideration might be given to a preparatory hearing. The advantage of doing so is that it would facilitate an interlocutory appeal to this court, with the attraction of preventing

the case from proceeding on a false footing and saving the parties from very substantial losses of time and money.

59. The third issue concerns the position of the Legal Aid Agency ("LAA") and the extent to which its role and responsibilities have impacted on the progress of these proceedings. At this stage, it is only necessary to draw attention to Recommendation 16 of the Review which was in these terms:

> *"*We would welcome more widespread and formalised cooperation between the Court and the LSC [the forerunner of the LAA] – extending to attendance by the LSC at PCMHs where appropriate – to assist the Court with addressing the practicalities in time, approach and costs flowing from an order for disclosure and to assist the LSC with the identification of the real issues in the case. The detail of such cooperation should be considered further in consultation between the professions and the LSC, to be followed by appropriate consultation with the Judiciary.*"*

60. Subsequently, in July 2013, a Protocol ("the LAA Protocol") was finalised and signed on behalf of the LAA and by Gross LJ, as Senior Presiding Judge. Copies of the final version were thereafter circulated, *inter alia*, to various professional organisations representing both barristers and solicitors. Unfortunately, the LAA Protocol does not appear to have been publicised more widely, though evidence from the LAA placed before us states that the Protocol "codified pre-existing best practice regarding transparency in its communications with the judiciary and the prosecution in [Very High Cost Cases referred to as] VHCCs". The LAA's position is that its staff continue to comply with the LAA Protocol. In our judgment, the LAA Protocol should be revisited by the office of the Senior Presiding Judge with a view to its more widespread dissemination. In relation to the most complex cases, subject to necessary safeguards, there are times when the court can assist the LAA in supplying a clear focus upon the issues (thereby allowing them to focus funding arrangements appropriately) and other times when the expertise of the LAA could prove of assistance to the court.

…

Abuse of process

61. A court has the power to stay criminal proceedings for an abuse of process in two categories of case, namely (i) where it will be impossible to give the accused a fair trial and (ii**)** where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case, in short, where it would not be fair to try the defendant: see, for example, *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42, HL and, in particular, per Lord Lowry who observed (at page 74F) :

> "… [P]rima facie it is the duty of a court to try a person who is charged before it with an offence which the court has the power to try and therefore the jurisdiction to stay must be exercised *carefully* and sparingly and only for compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct… '*pour encourager les autres"*".

62. More recently, the test has been elucidated in *R v Maxwell* [2011] 1 WLR 1837 by Lord Dyson SJC in these terms (at paragraph 13):

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74g) or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in *R v Latif* [1996] 1 WLR 104 , 112 f)."

63. In reaching his conclusions, [the judge] decided that the trial date of January 2016 could no longer be maintained and … considered whether it was now appropriate to stay the proceedings on the basis of delay. He 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.

64. 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 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 criminal justice system. As outlined above, he 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.

65. Having set out the relevant authorities on delay and abuse of process in all three of his judgments, the judge also dealt with the risk to a fair trial as a consequence of delay. … [which he considered was] "clearly unjustified" ... and "... there is clearly fault on the part of the prosecution" … concluding … that there had been prejudice to the respondents in "not having their case tried and determined in September 2012 or September 2013". However, he noted (at … that:

> "this was a case which was likely to depend to a large extent on evidence from documents rather than from recollections and that, to the extent that recollections were necessary, contemporary documentation would allow recollections to be refreshed".

66. The authorities also make it 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. In *R v S (P)* [2006] 2 Cr App R 23 (at [21]):

> "In the light of the authorities, the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles:
>
> (i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
>
> (ii) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;
>
> (iii) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
>
> (iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;
>
> (v) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

67. The court went further in *R v F (S)* [2011] EWCA Crim 1844 expressing the position in

these terms:

> "40 The explanations for delay are relevant to an application to stay only if they bear on how readily the fact of prejudice may be shown. Unjustified delay in the making of the complaint, and even more so institutional prosecutor misconduct leading to delay (which is what the court was considering in Attorney General's Reference (No 1 of 1990)) may make the judge more certain of prejudice, which may even have been the aim of the delay. That is the import of the references in the cases to the reasons for the delay. That is, however, a long way from the proposition that unjustified delay is by itself a sufficient reason for a stay. It is not.
>
> ...
>
> 47 When abuse of process submissions on the grounds of delay are advanced, provided the principles articulated in *R v Galbraith* [1981] 1 WLR 1039 and *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 are clearly understood, it will no longer be necessary or appropriate for reference to be made to any of the decisions of this court except *R v S (P)* [2006] 2 Cr App R 341 and the present decision. These four authorities contain all the necessary discussion about the applicable principles. Their application, whether in the Crown Court or in this court, is fact-specific, and is to be regarded, unless this court in any subsequent judgment expressly indicates the contrary, as a fact-specific decision rather than an elaboration of or amendment to the governing principles. In this court, but not the Crown Court, the separate question of the safety of the conviction, if there is one, may also arise for decision. Again, however, the issues which may arise are illustrated by *R v B* [2003] 2 Cr App R 197 and *R v Smolinksi [2004]* 2 Cr App R 661. No further citation of authority is needed."

68. Having stated that there had been prejudice to the respondents, [the judge] ... was thus rightly concerned, as we are, about the effect that the delay has had on the respondents personally; the significant inconvenience and distress it will have caused to have these proceedings hanging over them. However, the judge appears to have placed greater weight on this personal prejudice rather than considering whether there is serious prejudice in the sense that they will be deprived of a fair trial.

69. As the judge accepted, the case turned in large part on documentary evidence and to the extent that recollections were necessary, documents would allow memories to be refreshed. While he was concerned 10 years on from the date that the alleged conduct occurred, memories would have faded, this is arguably true of many prosecutions.

Furthermore, in this case, the respondents have had the prosecution Case Summary and statements of the prosecution witnesses for many years and have thus have had and will have ample opportunity (even if they needed it) to re-acquaint themselves with the detail of what is an almost exclusively paper based prosecution case.

...

70. Suffice to say, in our judgment, the delay, of itself, was not sufficient to warrant a conclusion that the respondents could not now receive a fair trial and [the judge] was wrong so to find. They clearly then could and we have no doubt that they still can. 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 Articles 5(3) or 6(1) of the ECHR, there is clear authority for the proposition that such delay may be cured by a reduction in sentence. Thus, in *Spiers v Ruddy* [2008] 1 AC 873, having reviewed the authorities (including those emanating from Strasbourg), Lord Bingham observed (at para 16B):

> "The authorities relied on and considered above make clear, in my opinion, that such delay does not give rise to a continuing breach which cannot be cured save by a discontinuation of proceedings. It gives rise to a breach which can be cured, even where it cannot be prevented, by expedition, reduction of sentence or compensation, provided always that the breach, where it occurs, is publicly acknowledged and addressed."

71. Having concluded there was no basis on which to stay the prosecution under first limb abuse of process, would it nevertheless be unfair to try the respondents now? As noted above, [the trial judge] focussed on the prosecutorial failings in this case. That brings into play the balancing exercise identified in *R v Latif and Shahzad* [1996] 1 WLR 104, by Lord Steyn (at page 113A-B):

> "[I]n a case such as the present the judge must weigh in the balance the public interest in 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".

72. The problem arises because maintaining confidence in the criminal justice system (or, as it has been put, avoiding "an affront to the public conscience") is an aim or aspiration which has to be perceived from different directions. On the one hand, there is gross misconduct which the criminal justice system cannot approbate (as in cases such as *Bennett* and *R v Mullen* [2000] QB 520). On the other hand, however, it is important that conduct or results that may merely be the result of state incompetence or negligence should not necessarily justify the abandonment of a trial of serious allegations. As has

been observed, there is no bright line and a broad brush approach is likely to be necessary.

73. In this case, it is beyond argument that there has been no deliberate misconduct or bad faith on the part of the prosecution. Every effort has been made to comply with the disclosure strategy to which it had, rightly or wrongly, agreed even if some of the steps taken have been insufficiently thought through or have proved to be ineffective. There was no deliberate disregard for a clear direction of the court, as there was in *R v Boardman* [2015] EWCA Crim 175. In any event, that case did not involve an allegation of abuse of process but concerned a refusal to adjourn a fixed trial with consequential orders relating to the admissibility of evidence made pursuant to s. 78 of the Police and Criminal Evidence Act 1984.

…

74. The availability of other sanctions with teeth was a source of concern for the court in *R v S(D) and S(T)* [2015] EWCA Crim 662 (see [71]) and exercised the attention of the recent Review of Efficiency in Criminal Proceedings. 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. We emphasise that we are not suggesting that the respondents to this appeal deliberately set about to undermine the prosecution. ... Suffice to say that there will be cases (such as *Boardman*) where prosecutorial failures can bring a prosecution summarily to an end but these can only be decided on a case by case basis and it is difficult to generalise as to the circumstances in which they arise. The search for an effective sanction will continue but improvements are likely to be based in the adoption of other aspects of the Review of Efficiency (not least the requirement to "get things right first time").