IN THE ROYAL COURT OF GUERNSEY

Between **THE LAW OFFICERS OF THE CROWN** **Prosecution**

-v-

DANIEL HERCULES DE KOCK **Defendant**

Defence Application for Disclosure

Before: Richard James McMahon Esq., Deputy Bailiff

Hearing date: 21st January 2016

Judgment handed down: 27th January 2016

Advocate for the Prosecution: **Advocate R J Calderwood**
Advocate for the Defendant: **Advocate C M Fooks**

Cases and materials referred to in the Judgment:-

The Prevention of Corruption (Bailiwick of Guernsey) Law, 2003
The Prevention of Corruption Act 1906
Taylor v Law Officers of the Crown [2011-2012] GLR 81
R v H [2004] 2 AC 134
The Criminal Procedure and Investigations Act 1996
Law Officers of the Crown v Qushair (unreported, 26 May 2015)
Law Officers of the Crown v Alvarez (unreported, 25 October 2012)
The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003
Blackstone's Criminal Practice 2016
The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999

Introduction

1. The Defendant is facing an indictment containing a single count, which is listed for trial commencing on 14 March 2016. The offence charged is corruption, contrary to section 1 of the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003, as amended. The allegation is that, on or about 4 June 2013, the Defendant, as an agent for his then employer, SG Hambros Private Bank, corruptly accepted or obtained for himself a Jaguar motor car from Sam Alaia as an inducement to, or reward for, doing an act in relation to the bank's affairs, namely facilitating the application of Mr Alaia for a loan from the bank. I understand that this is the first occasion on which such an offence under the 2003 Law has been prosecuted in

Guernsey. The elements of the Guernsey offence appear to have been drawn from section 1 of the Prevention of Corruption Act 1906 (now repealed) in the United Kingdom.

2. By an Application dated 18 January 2016, the Defendant seeks an order that "*the Prosecution do forthwith produce/procure the production of documents listed on the Defendant's Scott Schedule*" attached to the Application and for the reasons set out therein. That Scott Schedule contains 38 entries. On behalf of the Crown, Advocate Calderwood has resisted this Application.

Legal principles

3. Counsel were broadly agreed as to the applicable legal principles, recognising that the Court of Appeal in *Taylor v Law Officers of the Crown* [2011-2012] GLR 81 has definitively stated the duty in the following terms (at para. 131):

> "*... the duty of the prosecution in Guernsey is to disclose any material which might reasonably be considered capable of undermining or weakening the case for the prosecution or of assisting the case for the accused.*"

4. In reaching that conclusion, the Court of Appeal analysed a number of authorities on disclosure from England and Wales, but paid particular attention to *R v H* [2004] 2 AC 134. The emphasis is on ensuring the fairness of an accused's trial. For example, at para. 14 of his speech, Lord Bingham of Cornhill stated (quoted at para. 125 in *Taylor*):

> "*Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied upon as part of its formal case against the defendant, should be disclosed to the defence. 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.*"

However, the requirement to disclose does not mean that the prosecution should dump on the defendant or the Court all of the material it has obtained during the investigation prior to the trial. The prosecution is required instead to identify documents and information that are material. As Lord Bingham put it (at para. 35, quoted at para. 133 of *Taylor*):

> "*If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seeks to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.*"

5. There are, of course, differences between the trial framework in England and Wales and in Guernsey that have to be borne in mind. For example, there is no requirement here for a defendant to file a statement of his defence. One consequence of this is that ascertaining the Defendant's case is inevitably less clear that it would be if it had been set out in such a statement. Further, there is no Guernsey equivalent of the Criminal Procedure and Investigations Act 1996, which was in force when *R v H* was decided. However, the Court of Appeal has clearly ruled as to the applicable test, which this Court is bound to follow. This was the approach taken in two cases to which Advocate Calderwood has referred: *Law*

Officers of the Crown v Qushair (unreported, 26 May 2015) and *Law Officers of the Crown v Alvarez* (unreported, 25 October 2012).

Parties' contentions

6. In the context of fairness, Advocate Fooks, on behalf of the Defendant, refers to the minimum rights to be afforded to a defendant in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, including, eg, "*to have adequate time and facilities for the preparation of his defence*". She notes that there was a period of time when the defendant was unrepresented by an Advocate during which the basis on which he resists the case against him has been disclosed to the Crown. In those circumstances, she submits that the analysis of the defendant's case is clearer and easier than might otherwise be the case.

7. Advocate Fooks highlights that one of the reasons underlying the Application is that certain material is needed to enable her properly to advance another application she has made on behalf of the Defendant, which currently stands adjourned, seeking to exclude from the evidence to be heard at trial a record of a meeting held on 10 June 2014 between the Defendant and colleagues of his at the bank, and consequential references to it in the Police interviews conducted with the Defendant. She acknowledges that applying the test from *Taylor* is fact- and case-sensitive. This is why it is essential for the Defendant to have access to material from which he can piece together an accurate chronology of events. As she commented, few people are able to recall what they were doing at a given period of time without the benefit of documents, including, eg, work-related documents, which jog our memories.

8. The Prosecution has already produced a draft Trial Bundle. It has also supplied to the Defendant a Schedule of Unused Material, to which have been added two addenda. There are 133 entries on this Schedule. Some of the items are shown as having been disclosed to the Defendant, whereas in respect of the remainder Advocate Calderwood asserts that he has properly considered whether these are disclosable and has concluded that they are not. However, Advocate Fooks has expressed surprise at the paucity of documentation disclosed. She does not suggest that the Prosecution is sitting on documents but rather she believes that she has not seen all the material that must be available to the Prosecution. In doing so, she refers to the extent of liaison that there must have been between the Police and the bank during the investigation. That is apparent from a statement of Paul Yabsley dated 30 October 2015, which was obtained from him because, as Advocate Calderwood explained in his covering letter dated 10 November 2015, "*It occurred to me recently that Mr Yabsley might be able to shed light on the extent of SG Hambros knowledge of the criminal investigation, prior to the abovementioned internal meeting at the bank.*"

9. In relation to some aspects of the Application, Advocate Calderwood complains that Advocate Fooks has produced no authority to support the Prosecution being ordered to "*procure*" material in the hands of third parties. Instead, Advocate Fooks has distinguished between the Prosecution producing what it already holds and procuring what it should have obtained. She suggested that the Prosecution is better placed than the Defendant to ask the bank to provide material. This is more expedient than if the Defendant has to pursue these issues directly with the bank. The Defendant is apparently in financial difficulty and has sought voluntary disclosure of documents from the bank, which has been refused. However, Advocate Calderwood submits that the picture painted by Advocate Fooks misconstrues the relationship with the bank, which is a third party and owes the Prosecution no favours. The investigative obligation of the Prosecution is to make reasonable enquiries only, thereafter the onus rests on the Defendant to pursue whatever enquiries he wishes to undertake. There is no property in a witness and making a direct approach to those from whom material is sought, as referred to in the Application, is permissible. Advocate Fooks' response to that suggestion is that, if only out of courtesy, she would always refer to the Prosecution before making any such approach.

10. Advocate Calderwood further submits that the Defendant appears to have misunderstood the Prosecution's case against him. The allegation made against the Defendant is that he received a specific motor car at a specified time as a bribe. The timeframe of the offence is, therefore, narrowly confined to that time, whereas the Defendant's Application seeks material relating to a much extended timeframe. The Prosecution will not be calling Mr Alaia to give evidence and so has removed from the material to be relied on what Mr Alaia has said to the bank by way of complaint. The Defendant's wish to explore further about Mr Alaia is, therefore, a red herring to the offence with which the Defendant is charged.

Material sought

11. The first items sought are Mr Alaia's convictions and cautions. These are held by the Prosecution (see item 115 of the Unused Material). A chronology of dates relevant to an enquiry into Mr Alaia by Avon and Somerset Police is also sought. Advocate Fooks explains that Mr Alaia's reliability and credibility are in issue, even though he is not to be called as a witness, because the investigation into the Defendant flowed from Mr Alaia's complaint against him. The Prosecution's response is that material in the hands of an off-Island police force goes beyond what is properly disclosable and amounts to a request for material in the hope that something will turn up (and so, adopting the reasoning in the ***Alvarez*** case, falls the wrong side of the line anyway). In relation to Mr Alaia's previous convictions, Advocate Calderwood suggests that his credibility will not be in issue before the Jurats and that any suggestion of bad character will support the Prosecution rather than undermine its case or support the Defendant's case. If it is suggested that Mr Alaia was acting maliciously when complaining about the Defendant, there is a need to distinguish between the complaint and the evidence unearthed as a result of investigating it. The integrity of that evidence is unaffected by whether Mr Alaia's complaint was the catalyst for the investigation.

12. The second item sought by the Defendant is the source of the allegation made by DC Wright when interviewing the Defendant on 23 October 2014, in which he referred to the people with whom the Defendant had been dealing as "*con artists*" and "*tricksters*". This similarly goes to the difference between the character of Mr Alaia and his associates. In response, Advocate Calderwood explains what DC Wright has explained about his questioning and points out that, in any event, such information would not assist the Defendant's case.

13. The next set of items (numbered 3 to 6 on the Scott Schedule) relates to copies of storage devices, being the computer seized from the Defendant's home, computers and devices seized from the bank, phones, including the Defendant's BlackBerry, and mobile phone records. Advocate Fooks refers to the need to have access to what is on all these devices as a means of assisting the Defendant piece together the sequence of events. In response, Advocate Calderwood says that the Defendant's personal computer has already been returned to him and that no computers were seized from the bank. The BlackBerry is apparently inaccessible because the Defendant supplied an incorrect password and the Prosecution believes that there is no way for anyone now to access what is on the device. In other words, what was stored on it is lost to everyone, so there is nothing capable of being disclosed. A Nokia phone has been analysed and the material produced reviewed against the ***Taylor*** test. In any event, the relevance of the material has not been adequately clarified because there are already in the Trial Bundle items of correspondence from which the Defendant ought to be able to piece together events.

14. The seventh item on the Scott Schedule is all records from Themis pertaining to Mr Alaia and/or the Defendant. In his statement of 30 October 2015, Mr Yabsley refers to having recorded notes on 'Themis' when he was employed at the Guernsey Border Agency. Advocate Calderwood indicates that this is covered by item 118 on the Schedule of Unused Material.

15. The eighth item sought by the Defendant is disclosure of all records and documents relating to information received by the Police on or around 2 May 2013 concerning Mr Alaia (as referred to in Mr Yabsley's statement). Advocate Fooks submits that this will indicate the state of knowledge of Mr Alaia demonstrating that a corrupt bargain was not possible. The Prosecution response is that the material shows that the Defendant has misunderstood the chronology of events because the material in the Trial Bundle shows, on the Defendant's own account, that this argument is simply not available to him because Mr Alaia's loan application was not rejected until after the motor car had come to Guernsey and been handed over to him. Further, the integrity of the evidence obtained through the investigation is not affected by what happened on or about 2 May 2013 and the entire request appears to be speculative in that there is a hope that something will turn up as a result of being provided with this information.

16. The ninth item sought is all records of all discussions Sean Bougourd (an employee at the bank at that time) had with the Defendant between 15 November 2013 and 9 June 2014. The reason given by Advocate Fooks is that this is relevant to the extent of liaison between the bank and the Police and that it forms part of the Defendant's employment record and is relied on by the Prosecution. Advocate Calderwood refers first to a file note from 15 November 2013, which has already been disclosed as Unused Material, and then queries whether there is properly a link between seeking material in the hands of the bank about discussions between two people with the assertion that this will assist in identifying how much liaison there has been with a view to supporting the application to exclude the internal bank discussion held with the Defendant on 10 June 2014.

17. The tenth item listed (and a number of those that follow) relate to 4 June 2013. This item relates to records made of contact that day by law enforcement with Mr Alaia. Advocate Fooks further explains that any such material of which employees at the bank were aware prior to the discussions on 10 June 2014 is relevant to the question of whether there was an interview by investigators that day that should have been conducted differently or just an internal employment-related discussion. The related eleventh item concerns information that Mr Yabsley or the Police had about Mr Alaia's travel plans and the twelfth item is about details of all contact between the bank and the police as a result of Mr Alaia being spoken to on 4 June 2013. Advocate Calderwood acknowledges that the transcript of the meeting held with the Defendant on 10 June 2014 and Mr Yabsley's statement confirm that the bank was aware of an ongoing Police investigation so the basis for the submissions Advocate Fooks wishes to make about whether this was an interview and, if so, whether it should be excluded from the evidence, can be pursued without further disclosure. He suggests that the Defendant is speculating about the existence of material in the possession of the Police when in fact very little was generated.

18. Items 13 to 27 are similar again. They seek disclosure of the contact Ms Bisson (of the bank) had with the Police in June 2013; of Mr Bougourd's meeting with the bank's MLRO; of the communications the bank had when seeking consent to discontinue its banking relationship with Mr Alaia and a Mr Carruthers; what was said within the bank about the contact the Police had with Mr Alaia in June 2013; how the bank monitored the situation; the entries made by Mr Yabsley and notes made about his contact with Ms Bisson on 24 July 2013; notes of meetings within the bank of different departments in October 2013; what law enforcement agencies told the bank prior to the meeting with the Defendant that took place on 10 June 2014; Mr Bougourd's notes from 15 November 2013; disclosure of the dates, times and history of the bank's dealings with law enforcement regarding the complaint by Mr Alaia and the investigation into the Defendant (and vice versa); what Mr Yabsley discussed with bank personnel on 30 May 2014; disclosure of the records of the meeting held by bank personnel with the Defendant on 30 May 2014; any other records relating to the meeting that took place on 10 June 2014, including any documents prepared by Mr Bougourd or Camilla Le Maitre prior to the meeting for use at it; and a copy of the recording of the meeting (given the

transcription issues identified in PC Wright's statement of 29 July 2015 producing an amended transcript). Advocate Fooks submits that each of these items is required because they go to the state of knowledge of Mr Bougourd and others at this time and how it may affect the admissibility of the record of the meeting on 10 June 2014. In response, Advocate Calderwood almost uniformly repeats what he has submitted in respect of item 12.

19. Item 28 is a "*bank diary*", which Advocate Fooks asserts is already in the possession of the Prosecution. Advocate Calderwood suggests that there is an inadequate explanation as to why this document will assist the Defendant's case and that referring to the state of knowledge of the bank and Mr Bougourd is too vague.

20. Item 29 seeks the bank's performance reviews of the Defendant from 1 October 2010 until 30 June 2014, suggesting that these were relied on by Mr Bougourd whose veracity is in issue. Advocate Calderwood's response is to point out that unused material is not disclosable simply because a defendant requests sight of it and, in any event, if it were being relied on by the Prosecution, which it is not, it would appear in the Trial Bundle.

21. Item 30 seeks disclosure from the bank's "Olympic system" to show or confirm who was the bank's primary manager of the relationship with Mr Alaia. The Defendant suggests that it was not him but Mark Trenchard and points to the fact that there is already reference to a document from the system at item 68 of the Schedule of Unused Material. Advocate Calderwood points out that proof of the offence under the 2003 Law does not depend on whether the agent had authority to do what the alleged bribe was designed to induce or reward and so these materials are irrelevant to the case. In any event, these are matters that can be put to the witness in cross-examination on the basis of the Defendant's instructions.

22. Item 31 seeks "*disclosure of any bank material which may undermine the credibility or reliability of the prosecution witnesses Trenchard or Bougourd*". This is premised on the Defendant's understanding that the bank has dismissed both of these persons and that it is incumbent, therefore, on the Prosecution to review the reasons for these dismissals to see if the reasons involved anything related to the transactions involving Mr Alaia and/or Mr Carruthers. In addition to repeating his submission about procuring disclosure of material held by third parties, Advocate Calderwood suggests that this is a wide-ranging and entirely speculative request and that it offends against the principle set out in the ***Alvarez*** case that material for use in cross-examination as to credit should not be ordered (see para. 13(iii): "*there is a line of consistent English authority … to the effect that a witness summons there will not be issued for documents which merely give rise to a line of enquiry. It is very clear that cross-examination as to credit is no justification*").

23. Item 32 seeks the vacation diary dates for a number of people, the reason being that it is the Defendant's case that the facility letter of Mr Alaia was signed after 4 June 2013. Advocate Calderwood's response is that the date the letter was signed is irrelevant to the Prosecution case because the bribe can take place before, during or after the deal to which it relates is concluded.

24. Item 33 seeks disclosure of the bank's expenses and staff reviews in respect of the Defendant. Advocate Calderwood accepts that it is common ground that the Defendant was in South Africa in the summer of 2013 and criticises the absence of any valid explanation as to how this fact is relevant.

25. Item 34 relates to the bank's correspondence and records relating to Petrocomm in the 90-day notice period prior to the account being closed and all correspondence for Extwhistle Hall. The reason given is that this transaction in respect of Extwhistle Hall occurred in the run-up to 4 June 2013 and had been communicated to Mr Alaia, with the consequence that it

demonstrates the relationship of the bank staff with Mr Alaia and the possibility that Mr Alaia was seeking revenge. Advocate Calderwood suggests that the Defendant has failed to show the relevance of this matter in the context of the allegations made against him.

26. Item 35 relates to referrals made by Mr Yabsley to the FIU, which is designed to elicit the stage or stages reached in the investigation against the Defendant. Advocate Calderwood gives the same response as in respect of item 12.

27. Item 36 seeks disclosure of Ms Le Maitre's qualifications and experience as a former law enforcement officer and her links with Mr Yabsley. Advocate Calderwood queries how a person's previous rôle impacts on the assessment of whether a meeting should properly be characterised as an interview for the purposes of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 regime and that this is opportunistic.

28. Item 37 relates to all communications between Le Riche Automobile Restorers (CI) Ltd and Mr Alaia about his ownership of the motor car in question, including the documents supplied to enable onward sale of the vehicle. Advocate Calderwood suggests that, as a result of items 21 and 22 on the Schedule of Unused Material, which have already been disclosed, the Defendant is speculating that there must be more material in existence. Further, the content of the unused material is such that it potentially damages the Defendant's case rather than assists it and the motives of Mr Alaia making his complaint to the bank are irrelevant.

29. Finally, item 38 seeks the notes held by Customs Officer Radford about any discussions he had concerning Mr Alaia because his witness statement is merely a summary of his discussions and the complaint made by Mr Alaia lies at the heart of the Prosecution case. Advocate Calderwood suggests that there is no indication of how the Defendant would propose to use the material requested at trial as there are contradictions to what the Defendant himself has said and what Mr Alaia is purported to have said will be inadmissible hearsay.

Discussion

30. I have reminded myself generally as to what is said about disclosure in *Blackstone's Criminal Practice 2016*, at the same time cautioning myself against applying what is written there slavishly because of the absence in Guernsey of the statutory framework under which many of the cases referred to have been decided. I have done so to flesh out the approach to be taken to the test set out in *Taylor*, which binds this Court. I am satisfied that, even without a basis in legislation, there is a continuing duty on the Prosecution in Guernsey to review questions of disclosure and that this will operate until the decision to acquit or convict is taken (see para. 9.24). This is clearly an aspect of ensuring that a defendant receives a fair trial. I am also satisfied, as a general statement, that Advocate Calderwood has been endeavouring to apply the disclosure test in *Taylor* and I take his assertion that he has done so as more than merely paying lip-service to this requirement. Indeed, following the hearing, Advocate Calderwood sent an e-mail timed at 10.18 on 26 January 2016 confirming that he had re-visited the unused material in the possession of the Prosecution in the light of the way Advocate Fooks put the Defendant's Application and was able to confirm that none of it, in his view, satisfies the *Taylor* test. Advocate Fooks has taken care not to question the bona fides of the Prosecution in this regard and I respect the fact that she has not levelled what would otherwise be unjustified criticism against Advocate Calderwood in this regard.

31. The first distinction I draw is between material held by the Prosecution and material in the hands of third parties, which in this context principally means the bank. Whilst it is open to the Prosecution to apply for production orders to secure material as part of the investigation of an offence, and a production order was made pursuant to section 45 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, as amended, on 11 September 2014

and executed thereafter on the bank, to do so at this stage with a view to obtaining material that would then be included on the Schedule of Unused Material and so disclosable to the Defendant is, in my view, taking matters at least one step too far. The Prosecution duty of disclosure relates to material in its possession. The Prosecution cannot disclose something that it does not hold. Provided that the investigation has pursued all reasonable lines of inquiry, including those that point away from the Defendant as a suspect as well as those pointing towards him having committed an offence, their obligations have been fulfilled and any further enquiries are in the hands of the Defendant and his advisers themselves. The suggestion that the Prosecution is better placed to obtain material than a defendant in financial difficulties, in my view, is without substance. Such obligations to obtain and disclose material either exist or they do not and the financial circumstances of a defendant can have no impact on that issue.

32. Accordingly, insofar as the material sought by the Application is in the hands of third parties (ie, items 1 (in part), 9, 14, 15, 16, 18, 22, 23, 26, 27, 29, 31, 32, 33 and 37), it is refused. A number of the other items listed on the Scott Schedule could be in the hands of the Prosecution (or those responsible for the investigation) or could be in the hands of the bank, eg, items 30 and 34. Insofar as they are only in the hands of the bank, for the same reasoning, disclosure cannot, in my view, be ordered. Where they have already been disclosed, eg, the Defendant's leave summary (which is part of item 32 of the Scott Schedule and listed as item 102 of the Schedule of Unused Material), the Application is, in any event, unnecessary.

33. Item 34, relating to earlier transactions of the bank involving Petrocomm and Extwhistle Hall, is potentially a hybrid set of documents. The only duty of disclosure is in relation to material held by the Prosecution. Insofar as the Prosecution holds material relating to these earlier transactions (and items 43 to 45 on the Schedule of Unused Material suggest something associated with them is held), I am persuaded that it falls to be disclosed. Whilst Advocate Calderwood is correct to focus on the Prosecution case and explain that these matters do not feature in it, I can envisage ways in which the Defendant might well want to refer to previous dealings he had with Mr Alaia as part of his case. The file notes listed are also of meetings he attended. Accordingly, there is no reason why he should not see copies of them, plus anything else of that type held by the Prosecution, so as to decide what use, if any, to make of his previous dealings. In my judgment, the ***Taylor*** test is met in respect of these documents in the Prosecution's possession. However, if the Defendant believes that the bank holds more information, he must seek it directly from the bank by whatever means are open to him. To that extent, the Application in respect of item 34 is granted.

34. The next distinction I draw is between documents and information on the one hand and the items seeking images to be taken of computer hard drives and devices (ie, items 3 to 6). I am satisfied from the explanations tendered by Advocate Calderwood that this part of the Application should also be rejected. The Defendant has had his home computer returned to him. Nothing was seized from the bank (and to that extent there is a further overlap with the reasoning in the preceding paragraph) so there is nothing in the possession of the Prosecution to copy. I am also persuaded that there is no means of obtaining access to the BlackBerry seized from the Defendant and that he has already been provided with the relevant phone records from the Nokia. In those circumstances, the Prosecution has properly complied with its disclosure obligations already and nothing further is required to be disclosed now in relation to information contained on such hardware.

35. The final distinction I draw relates to those items that are directly associated with the meeting held at the bank on 10 June 2014 and which can be said to have an impact on the Defendant's other application seeking to exclude the transcript of that meeting from the evidence and other matters (including item 34, with which I have already dealt). Whilst I appreciate the way in which Advocate Calderwood suggests that the other application can be pursued without there being further disclosure, it is quite clear that it is a significant part of the Defendant's case to

argue that this transcript (and associated references) should not be admitted into evidence. In my judgment, some of the items sought by the Defendant must now be produced by the Prosecution because, having conducted a careful analysis of the manner in which he seeks to resist the charge, I am satisfied that they meet the *Taylor* test as "*reasonably [being] considered capable of undermining or weakening the case for the prosecution or of assisting the case for the accused*". In reaching this conclusion, I have concentrated very particularly on the Defendant's intention to challenge the admissibility of the record of the meeting on 10 June 2014. I am not persuaded by Advocate Calderwood's submission that the Defendant already has sufficient material from which to mount this challenge because I take the view that the obligation to disclose extends beyond sufficiency to everything held by the Prosecution that could reasonably be of use to the Defendant in this regard. In doing so, I consider that full disclosure of these matters is part of "*the golden rule*" to which Lord Bingham referred because I am of the view that it will reasonably assist the Defendant in the preparation of his case.

36. The first item that falls into that category is item 24: "*Disclosure of the dates, times and history of the Police / law enforcement authorities/dealings with SGH regarding the Alaia complaint / de Kock investigation. To include (but not be limited to) all notes made, emails sent, phone calls had and documents created.*" (I think the breadth if this item might also cover items 10 and 12 (insofar as the Police informed the bank about that contact with Mr Alaia), as well as items 13, 17, 19, 20, 21 and 25 anyway and, insofar as any of these items go beyond item 24, the same reasoning applies as to why each of those items now falls to be disclosed.) I take the view that, if there continues to be a question as to whether the meeting held constituted an interview for the purposes of the 2003 Law regime, and the respective submissions of Counsel persuade me that this remains in dispute between them, it is appropriate for the Defendant to be apprised of the contact made by the law enforcement agencies with the bank insofar as those law enforcement agencies have records of those contacts. This is because this will potentially support the Defendant's case that the bank's staff were acting as investigators (or it will point away from that conclusion). Whilst this is not a final answer to whether the transcript should be excluded, it is effectively a pre-condition to invoking the exclusionary principles on which Advocate Fooks will seek to rely to show that this meeting was something more than simply an internal employment-related meeting. I have noted Advocate Calderwood's comment that "*in fact very little was generated*", but whatever little was generated within law enforcement should, in my view, be disclosed to the Defendant. Similar reasoning applies to the second item concerned, the "*bank diary*" at item 28, assuming, as Advocate Fooks asserts, that a copy has been provided to the Prosecution.

37. By way of distinction, item 23 appears to me to be a request for the information relating to these contacts held by the bank. However, as I have already indicated, that would be a part of the procuring aspect of the Application and must be rejected. Of course, it would only be if there were more information held by the bank than the Prosecution that this would result in there being some gap capable of being filled by the Defendant taking direct action against the bank.

38. Hidden away within item 27 is a request for a copy of the recording of the meeting on 10 June 2014. On the basis that PC Wright has listened to a copy to make amendments to the transcript, I take the view that, consistent with the ability to listen to a recording of a Police interview to ensure the accuracy of the transcript, Advocate Fooks must have the opportunity to listen to this recording to compare what was said with what has been transcribed. To that extent, and so far as it is necessary to do so, although I have generally refused item 27 as being material in the hands of the bank, I will order that the Prosecution make available a copy of that recording.

39. Moving to the other material, although I regard it as a borderline matter, I have concluded that the Prosecution should disclose to the Defendant the previous convictions of Mr Alaia (item 1). It is apparent to me that the Defendant wishes to consider how, if at all, to deploy such information in support of his case. He can only give appropriate instructions to Advocate Fooks if he knows what those convictions are. These previous convictions feature at item 115 on the Schedule of Unused Material. Whilst I have some sympathy with Advocate Calderwood's stance that Mr Alaia's credibility will not be in issue at the trial and that, at face value, his bad character would arguably support the Prosecution case rather than weaken it or assist the Defendant's case, I have concluded that there might be more to this request than obviously meets the eye and, in order to provide the Defendant with an appropriate opportunity to deploy this material, it is only fair that he is privy to the same information in this regard as the Prosecution has and has chosen not to use. Accordingly, I have concluded that fairness warrants disclosure of this information as it is probably just more than the type of neutral material to which Lord Bingham referred.

40. As regards item 2, I do not consider that it is appropriate to order the Prosecution to divulge the source of why DC Wright referred in interview to con men and tricksters. This is something that can be explored in cross-examination, should the Defendant wish to do so and, in any event, Advocate Calderwood has provided the material sought in his responses to the Scott Schedule. There is, therefore, nothing further disclosable anyway.

41. In relation to item 7, Advocate Calderwood submits that this has already been disclosed as Unused Material at item 118 on the Schedule. Accordingly, there is nothing further to which this item in the Application relates and so this item is also rejected. However, in relation to item 8 regarding information received by the Police on or around 2 May 2013 about Mr Alaia, I am not persuaded how this would be used by the Defendant in the manner required to meet the ***Taylor*** test. In any event, this is the type of request that smacks of being a fishing expedition, made in the hope that something will turn up. Seeking "*all records and documents*" relating to a particular matter is also verging on being the type of request that lacks sufficient particularity, as is now required. In my judgment, this is not a request that falls within the ***Taylor*** test and so it is also rejected on a similar basis to that set out in the ***Alvarez*** case. Similar reasoning applies to item 11 and item 19 (in part), which seek disclosure of the sources of information on which Mr Yabsley acted, and so the Application for these elements of disclosure is also rejected. Again, the nature of item 35 appears to me to add nothing to what I have already addressed in respect of communications from the Police to the bank prior to the meeting on 10 June 2014 and so also fails the ***Taylor*** test.

42. As regards item 30, insofar as the Prosecution have anything from the bank about who was authorised to deal with Mr Alaia and to what degree, I am not persuaded that this satisfies the ***Taylor*** test. If questions are put to a witness about this and so it becomes relevant at that stage, the ongoing duty of disclosure would require the Prosecution to draw to the Defendant's attention any material that is inconsistent with what a witness might recall. For the time being, though, the Defendant's instructions about internal responsibilities will have to suffice. Disclosure of item 30 is, therefore, rejected.

43. I do not see how the qualifications and experience of Ms Le Maitre and any links she has had with Mr Yabsley (item 36) is a proper matter for disclosure. Advocate Fooks clearly recalls that both have played their parts working for law enforcement agencies previously without there being any need to disclose more details to assist the Defendant in pursuing whatever line he wishes in this regard. Further, I am aware that a number of people who have worked in law enforcement take employment in the private sector and I do not consider it would be appropriate for the Prosecution to have to disclose the type of details sought in the event that one of them is involved in whatever capacity in a matter that reaches the criminal courts. In any event, given that I am ordering disclosure of the Police dealings with the bank prior to the

meeting on 10 June 2014 because it is relevant to the issue of whether the record of that meeting should be excluded, it is possible that this will also include some or all of the material sought by this request. The Application for disclosure of item 36 in the form sought is, therefore, rejected.

44. Finally, in relation to item 38, I am persuaded that this element of the Application also fails the *Taylor* test. Advocate Fooks suggests that the complaint made by Mr Alaia lies at the heart of the Prosecution case. However, Advocate Calderwood has been at pains to explain that it does not and that it must be regarded as a red herring to focus so much on the origins of the investigation as opposed to the evidence gathered which will be used against the Defendant. The Prosecution has emphasised that it is not including in the Trial Bundle material relating to the complaint. The Defendant has not particularised how he wishes to deploy such material at trial, especially given that there is the spectre of it being inadmissible as hearsay. In those circumstances, I am not satisfied that the *Taylor* test has been met by the Defendant.

Conclusion

45. For the reasons I have given, the bulk of the Defendant's Application is dismissed. It did look very much to be such a wide-ranging application seeking far-reaching disclosure in the hope that material may turn up to bolster the Defendant's case, that I initially had some sympathy with Advocate Calderwood's overall opposition to it. However, on closer analysis, particularly bearing in mind the Defendant's stated intention to pursue his application to seek exclusion of the record of the meeting on 10 June 2014, I have most carefully analysed those elements of the Application that can reasonably be said to assist his case in this regard. That is principally why I have decided that the Application succeeds in relation to the items I have mentioned, being item 24 (and items 10, 12, 13, 17, 19, 20, 21 and 25 to the extent that not already covered by item 24) and item 28, but only in respect of material already held by the Prosecution. I also order disclosure of item 34, again to the extent of material already in the possession of the Prosecution, as well as Mr Alaia's previous convictions (as part of item 1) and a copy of the recording of the meeting on 10 June 2014 (as part of item 27). These materials should be provided to Advocate Fooks as soon as possible and in any event no later than 4pm on 29 January 2016.