

Protocol for the control and management of heavy fraud and complex criminal cases

Transcript of proceedings: 22 March 2005

A Protocol, and three new Practice Directions were handed down by the Lord Chief Justice, Lord Woolf, on 22 March 2005. The Protocol relates to the management of complex trials in England and Wales; its aim is to reduce the length of complex trials for fraud and other crimes. The Practice Directions relate to the introduction of improved case management into criminal hearings in the Crown Court and magistrates' courts in England and Wales, and jury service. The transcript of the proceedings is below.

Transcript of proceedings in the Court of Appeal, Criminal Division on 22 March 2005

Before the Lord Chief Justice, Lord Justice Thomas, Lord Justice Auld, Lord Justice Hooper and Mr Justice Calvert Smith.

Consolidated Criminal Practice Directions and Protocols

1. [Amendment No 9 to the Consolidated Criminal Practice Direction \(Jury Service\)](#)
2. [Amendment No 10 to the Consolidated Criminal Practice Direction \(Forms for use in Criminal Proceedings\)](#)
3. [Amendment No 11 to the Consolidated Criminal Practice Direction \(Case Management\)](#)
4. [A Protocol for the control and management of heavy fraud and other complex criminal cases](#)

The Lord Chief Justice:

The hearing this morning is being held to mark a significant stage in the evolution of the Criminal Justice system -- a system that includes both the Crown and Magistrates Courts, and is will shortly be supported by a single service, Her Majesty's Court Service.

The immediate purpose of this hearing is to enable the Court to hand down three Practice Directions and a Protocol. The handing down of those documents does not explain the significance of this hearing. To understand its significance it is necessary to start by referring to the report of Lord Justice Auld, who I am delighted is sitting with us this morning. His report, '[The Review of the Criminal Courts](#)', was completed in October 2001. It contains 328 recommendations which provide a blueprint -- a blueprint that could transform our venerable criminal justice system that has served us well for centuries, into a system which is better suited for the 21st century.

Lord Justice Auld's vision was not one which could be achieved overnight. Its implementation so far has required a vast amount of effort and co-operation from all those engaged in the criminal justice system, including the Department for Constitutional Affairs, the Home Office, the Attorney General's Office, the Crown Prosecution Service, practitioners from both sides of the profession and all those who are concerned with the welfare of victims and witnesses of crime.

Co-operation between these agencies and the bodies and individuals representing them has taken place on an unprecedented scale. The Courts Act 2003 enabled the [Criminal Procedure Rule Committee](#) to be established. The Rule Committee either contains representatives of each of the bodies to whom I have referred or its deliberations have been supported by those bodies.

Thanks to their efforts, in January of this year I was able, on behalf of the Committee, to submit to the Lord Chancellor and the Home Secretary a new set of Criminal Procedure Rules which were laid before Parliament on Friday 4 March 2005, and which are due to come into force with the concurrence of the Lord Chancellor and the Home Secretary on 4 April 2005, the first day of next term.

The Rules are not by any means all new but they have been consolidated for the first time. In commending them to the Lord Chancellor and the Home Secretary, I made three main claims for them:

- (1) They are an essential first step in the creation of a criminal procedural code. They make procedure rules more readily accessible than before. They bring together in one place rules previously contained in almost 50 separate statutory instruments, with a glossary and with notes to help readers identify other legislation to which they may have to refer.
- (2) By adopting existing rules and court forms they maintain a sensible degree of continuity and stability
- (3) Most importantly, they promote a culture change in criminal case management. They introduce new rules, written in plain English, that give courts explicit powers and responsibilities to manage cases actively, and to reduce the numbers of ineffective hearings that cause avoidable distress to witnesses and inconvenience and expense to everyone.

As the Committee only met for the first time in June of last year this was a formidable achievement. I acknowledge the debt that we owe to the members of the Committee, each of whom has contributed with vigour, penetrative thinking and good humour to our meetings and especially my colleague, Lord Justice Hooper, who I am also delighted is sitting with us today. I do not include his puppy, Nelson, who over the weekend did his best to destroy all the work that had been done by eating the disc containing the only copy of critical material. We also owe a great debt to our late colleague Lord Justice Kay. The Committee regard the Rules as one of the memorials to his immense contribution to the criminal justice system. I am also happy today to acknowledge the debt the Committee owes to its Secretariat.

In response to my submitting the Rules, the Lord Chancellor replied:

"I share your sentiments. The Rules are an exciting and worthwhile contribution to the criminal justice system with the potential, if properly applied, to bring about the cultural change of which you have spoken and written. I endorse wholeheartedly your expressions of gratitude to members of the Committee and to the late John Kay, whose contribution was indeed immense."

The Home Secretary also wrote:

"These rules are a welcome development, particularly the new case management rules that will support the work on improving the effectiveness of the management of criminal cases and also those rules required for those

procedural and evidential provision of the Criminal Justice Act 2003 that we have agreed will be implemented in April. I also share your gratitude for the work of the Committee in producing them."

Although the new Criminal Procedure Rules substantially preserved the previous procedure, they represent the first ever consolidation of Criminal Procedure Rules in England and Wales. In addition, they subjected criminal procedure to an explicit and over-riding objective as to the manner in which criminal justice should be provided. They made it explicit that the judiciary were to be responsible for Case Management and expressly, for the first time, gave the judiciary the powers necessary for such Case Management (part 3 of the new rules). The rules apply not only to the Crown Court but also to the Magistrates' Courts. It is the over-riding objective (part 1) and Case Management (part 3), that go to the heart of the new culture that the rules promote.

Case Management is already an established part of the Civil and Criminal Justice Systems. However, the extent to which cases were managed previously has very much depended upon the taste of the individual judge. From 4 April, with the coming into effect of the new Rules, judges will be required to exercise an extensive managerial role at the Plea and Case Management hearing which is to take place for every case in the Crown Court.

Under the leadership of Lord Justice Hooper, a considerable amount of energy has been devoted to creating for the Plea and Case Management hearings a form ("PCMH form") which, while simple to use, ensures that all the matters that should be the subject of directions are dealt with.

The consultation that has taken place means that the PCMH form, is far more suited to fulfilling its needs than was originally the case. Here the contribution of the representatives of practitioners has been significant. It is my belief that because of the scale of their contribution the form will be effective in use. It is the Committee's belief that the forms will play a critical part in helping the court, prosecutors and defendants plan the progression of the case to its conclusion.

In the magistrates' courts, where over 95% of criminal cases are disposed of, it is hoped that the new emphasis on case management will at least reduce the recurrent problem relating to the use of adjournments.

The forms are designed to be easy to understand and to use. The Practice Directions that I am about to hand down, which I will refer to again shortly, should assist with the smooth implementation of the new Rules and the use of the forms. They also set out transitional provisions.

Protocol for the control and management of heavy fraud and other complex criminal cases

Hitherto, a lack of Case Management has contributed to problems across the whole criminal justice system. However, nowhere is this more evident than in the case of heavy fraud and other complex cases. Although these cases only form a small minority of the total number of cases before the Courts, they have been responsible for a succession of cases which have blighted the reputation of the criminal justice system. It is essential that there are brought under proper control. In order to achieve this, considerable effort has again been made by representatives of all the agencies and practitioners engaged in the conduct of these cases. Under judicial leadership — provided in particular by the senior presiding judge Lord Justice Thomas, Mr Justice Hughes and Mr Justice Jackson — a Protocol has been produced which I am about to hand down. The Protocol derives its authority from the eminence of the broad cross-section of individuals who have contributed to its creation and endorsed its contents rather than from it being binding in law, which it is not.

As part of Case Management, the judiciary can be expected to exercise their discretion in following the guidance contained in the Protocol. The Protocol is designed primarily for jury trials — although many of the principles will be applicable if trials without a jury are permitted under section 43 of the Criminal Justice Act 2003. It will ensure that trials are conducted in a way that will enable juries to retain and assess the evidence which they have heard. The need for this is obvious. If juries cannot do this, a trial will neither be fair to the defence or to the prosecution.

Central to the Protocol is its identification of a consensus that no trial should be permitted to exceed three months or an outer limit of six months, save in exceptional circumstances. With that exception, it is implicit in the Protocol that trials of six months are just not capable of satisfactory disposal. In addition, the roles of the lead advocates of the prosecution and the defence team are clearly identified. Furthermore, wherever practical, there is to be the same judge from the first hearing when directions are given to the conclusion of the trial. The trial date should also be fixed at the first opportunity so that everyone can work to a given date. Other provisions of the Protocol deal with expert evidence and disclosure.

A particularly important feature of the Protocol is the provisions it contains for avoiding applications based on alleged abuse of process becoming themselves an abuse. The Protocol expects those to be normally concluded within an absolute maximum of one day. If a complex trial is conducted in accordance with the spirit of the protocol, it should remain under control.

Practice Directions

Returning to the Practice Directions, they identify three Courts at which pilots are to take place. They are the Central Criminal Court, Preston Crown Court and Nottingham Crown Court. The fact that there are to be pilot areas at those three Courts does not mean that other Courts will not be the subject of Case Management in accordance with the Procedure Rules. The principal distinction between the pilot areas and the non-pilot areas, is that in the pilot areas positive action will be taken to ensure that the PCMH form is used strictly in accordance with its guidance notes by the judge and the advocates for the defence and prosecution. This is in contrast to the non-pilot areas where judges, unless there is agreement between local criminal justice agencies and practitioners to the contrary, will primarily use the PCMH form as a checklist to ensure that all the necessary directions are given.

An area of great concern to defence practitioners has been that it has proved impossible to arrange the way in which they are rewarded for their professional services to take into account the greater emphasis which the rules and Practice Directions place upon Case Management. The Department of Constitutional Affairs has recognised the need for an adjustment. However, fees are an extremely complex subject and so far it has proved impossible to introduce new arrangements either within or outside the pilot areas. The DCA does, however, anticipate that such an arrangement should be able to be made either in Nottingham or in Preston later this year. There is no possibility of this happening at the Central Criminal Court but there is a possibility that it will happen in the remaining pilot courts.

This Court hopes that this difficulty over payment of fees will not be allowed to interfere with the successful implementation of the new rules. There is too much at stake to allow this to happen.

In addition, I am handing down today Amendment No. 10 to the Consolidated Criminal Practice Direction which promulgates all the forms to be used in criminal proceedings alongside the rules, other than those to be used to facilitate case management. These forms are essentially the same as those already in use, suitably amended to refer to the new Criminal Procedure Rules.

I am also handing down a Practice Direction which will assist judges to exercise their discretion when

faced with an application from the increased number of jurors with public service commitments, resulting from section 321 of the Criminal Justice Act 2003.

All those to whom I have referred, have made a huge investment to achieve the changes which are needed. The support which the changes have received from all sides is the clearest indication of the strong desire of those involved in the Criminal Justice system to make that system a system of which we can be proud. If we go forward in the manner we have now the opportunity to do, that should release the resources which at the present time are not being used efficiently. This in turn should enable defence advocates to be rewarded in a manner that properly reflects the value of their contribution to the improvements that will be achieved in the conduct of trials.

A managed system in which everyone knows what is required of them, should operate in a manner which is far more rewarding for all involved than that which exists now. The effectiveness of the system will continue to improve and everyone's morale should be transformed and confidence in the justice system enhanced. We must all seize the opportunity which is now open to us to invest in a justice system for the future.

I hand down the Practice Directions and the Protocol.

Mr Dennis:

My Lord, I appear on behalf of the Attorney General and also the Director of Public Prosecutions, the Director of Customs and Excise Prosecutions Office and the Serious Fraud Office. I also indicate that my learned friend Mr Mansfield is here on behalf of the Bar Council, and my learned friend Mr Murray on behalf of the Law Society.

My Lord, the public are of course entitled to an efficient and effective criminal justice system. It is acknowledged that there is a need for better management of criminal cases to ensure that it is the real issues which are presented to the court for consideration and determination. The Practice Direction and Protocol are accordingly to be welcomed.

The introduction of the Criminal Procedure Rules is a significant event designed to fit with the criminal case management framework and other initiatives, all of them to aid a better management of criminal cases, to ensure fairness in the proceedings and that justice is done -- all of which are in accordance with an over-arching aim of the Criminal Procedure Rules that criminal cases should be dealt with justly.

The Attorney General and the prosecuting authorities welcome the emphasis on robust and well-informed case management to identify the real issues in the case so that the trial can focus on those. This depends on a well-prepared and well thought through prosecution case. But it also depends on requiring the defence to serve proper defence case statements. Everyone must play their part. As the Protocol acknowledges, in many fraud cases the primary facts are often not seriously disputed. But too often the prosecution are required to prove them, creating unnecessary complication in the trial process, delay and even confusion.

The Attorney General especially welcomes, therefore the proposal to focus clear attention on this issue and to narrow the case down by requiring clear consideration to be given at an early stage to evidential matters being reduced to admission form.

It is important that the prosecution should carefully consider whether cases can be cut down. The Attorney General has urged Directors to examine how the prosecution of serious large and complex

cases might be better managed. The Director of Public Prosecutions has developed a proposal for a Central Case Management Panel, chaired by himself, to consider the management of a small number of very complex cases likely to take more than six months at trial. This will be coupled with a similar process across the 42 areas. This will, the Attorney believes, offer real potential for maintaining a better control of cases such as are envisaged in the Protocol. A note of caution, however, is that there must be an awareness of the unwelcomeness of forcing the prosecution to present a case which does not represent the true criminality revealed by the available evidence.

The Attorney General also welcomes the advice in the Protocol on limiting disclosure to that which is truly discloseable within the statutory criteria. This will compliment what he will be saying in his new, revised guidelines on disclosure which are due to be published shortly.

Also welcomed is the setting of a timetable for witnesses so as to control excessive and prolix cross-examination.

Finally, the Attorney General would like to pay tribute to the work of the Criminal Procedure Rules Committee. He and the Directors are committed to ensuring that the plea and case management hearings are effective, that cases are managed in a vigorous manner to ensure resources are properly directed to assist in the early preparation of criminal cases.

The Lord Chief Justice:

Thank you very much. Mr Mansfield?

Mr Mansfield:

My Lords, on behalf of the Bar Council, may I say this? The Bar Council supports the objective of better case management in the Crown Court and the better use of resources. The Bar has long advocated early preparation to this end. However, such earlier work is not reflected by the current remuneration scheme. It is essential that it is if these desired savings and improvements are to be achieved. The Bar Council is negotiating with the Department of Constitutional Affairs to this end. I am grateful for the Lord Chief Justice's acknowledgement of the legitimate concerns of defence practitioners in this respect.

The Lord Chief Justice:

Thank you very much. Mr Murray?

Mr Murray:

My Lords, I welcome the opportunity, as Chairman of the Law Society's Criminal Law Committee, to confirm the Society's support for the changes introduced today by this Practice Direction on Criminal Case Management and the forms and Protocol handed down.

If I may be permitted to open my remarks on a personal note, the Criminal Law Committee's first introduction to the new era and culture of judicial management was heralded by a visit to us by the then Deputy Chairman of the Criminal Procedure Rule Committee, Lord Justice Kay, whose sudden death was such a grievous loss to the whole of the justice system and to which you have referred this morning. Lord Justice Kay was at pains to underline to the members of the Committee that the proposed rules were intended above all to be practicable and to allay any fears that they may seek to undermine the rules regarding legal professional privilege or professional duty to the client. The

presence of rule 1(1)(ii)(c) recognising the rights of the defendant is a fitting legacy. Both as a Recorder and as a member of the Criminal Justice Consultative Council, which he chaired, I was able to observed first-hand his enormous contribution to the criminal justice system and it is fitting that through your remarks this morning that should be remembered and recognised.

It is also right that the immense amount of work undertaken by members of the Criminal Procedure Rule Committee should also be acknowledged and on behalf of the Law Society I would wish to record the professional gratitude to them for, as practitioners, we recognise that through their efforts we have a significant opportunity to contribute to a code of criminal procedure and a criminal justice system which will indeed achieve the first of its overriding objectives: the acquittal of the innocent and the conviction of the guilty.

We also recognise that we are entering into uncharted territory, which the forms introduced today will seek to guide us through. They will become invaluable checklists of benefit to all of us who practise in the criminal courts. It would be facile to expect the new rules to come into force effortlessly and seamlessly, for to do so would ignore the shock of the new and the natural aversion to change in a branch of the profession which operates under severe financial restraints. Members of the Law Society will be encouraged to hear my Lord's remarks on fees this morning and his recognition of the value of the defence practitioners to the criminal justice system.

But change we must, and these rules and forms are necessary changes that we will all have to make to ensure their success. There will inevitably be teething troubles, which the consultative process introduced through the combination of the criminal case management framework and the local Criminal Justice Boards will identify and address. As you will know, consultations are already taking place through the DCA with the Law Society to provide a structure whereby solicitors can contribute effectively to this debate at a local level.

Whilst judges are now armed with sufficient weapons to attack the problems that have bedevilled the criminal trial process for so long, they will look to the professions and participants in the process for co-operation. May I assure you that in welcoming these changes the Law Society will strive to ensure that its member will provide that support and co-operation, for in so doing ultimately the interests of their clients and justice will be protected and enhanced.

I commenced my remarks on a personal note and will finish on one, for as a practitioner in the field of heavy fraud and complex criminal cases I welcome the Protocol introduced today, on their control and management, and also the remarks made by Mr Dennis this morning on behalf of the Attorney. There will be problems -- dare I introduce a note of caution -- particularly, I suspect, in the area of disclosure. But we must all strive to ensure that these do not hinder the objectives set out in the Protocol.

If we learn one thing from all the new changes it is that the court will not brook time-wasting. I shall therefore -- perhaps as the first practitioner to operate under the new regime -- set an example and take my cue from the rules by recognising the virtue of brevity and close my remarks.

The Lord Chief Justice:

Thank you very much. Can I thank Mr Dennis, Mr Mansfield and Mr Murray for attending today and supporting this significant event. I am most grateful for what they have said.