

Middle Temple Amity Visit to Hong Kong: Criminal Law Seminar 26.09.15

Case Management in Criminal Trials: Now or Never?

Notes for a talk by HH Judge Bartle QC on Case Management in England

Introduction

1. The sensible use of time requires judicial management and control:

“The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control”: **R v Jisl** [2004] EWCA Crim 696.

The Criminal Procedure Rules 2015 (CPR 2015)

2. 1.1 of the CPR 2015 entitled “the overriding objective” provides that:

“(1) The overriding objective of this procedural code is that criminal cases be dealt with justly.

(2) Dealing with a criminal case justly includes—

- (a) acquitting the innocent and convicting the guilty;
- (b) dealing with the prosecution and the defence fairly;
- (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
- (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
- (e) dealing with the case efficiently and expeditiously;
- (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
- (g) dealing with the case in ways that take into account—
 - (i) the gravity of the offence alleged,
 - (ii) the complexity of what is in issue,
 - (iii) the severity of the consequences for the defendant and others affected, and
 - (iv) the needs of other cases”.



3. 1.2 of the CPR 2015 entitled “the duty of participants in a criminal case” provides that:

- “(1) Each participant, in the conduct of each case, must—
- (a) prepare and conduct the case in accordance with the overriding objective;
 - (b) comply with these Rules, practice directions and directions made by the court; and
 - (c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.
- (2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule”.

4. 1.3 of the CPR 2015 entitled “the application by the court of the overriding objective” provides that:

- “The court must further the overriding objective in particular when—
- (a) exercising any power given to it by legislation (including these Rules);
 - (b) applying any practice direction; or
 - (c) interpreting any rule or practice direction”.

5. 3.2 of the CPR 2015 entitled “the duty of the court ” provides that:

- “(1) The court must further the overriding objective by actively managing the case.
- (2) Active case management includes—
- (a) the early identification of the real issues;
 - (b) the early identification of the needs of witnesses;
 - (c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
 - (d) monitoring the progress of the case and compliance with directions;
 - (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
 - (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
 - (g) encouraging the participants to co-operate in the progression of the case; and
 - (h) making use of technology.
- (3) The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible”.

6. “...all parties must be required to comply with the Criminal Procedure Rules and to work to identify the issues so as to ensure that court time is deployed to maximum effectiveness and efficiency. In the event that a suitable disposal of the case cannot be agreed, this includes ensuring that the necessary evidence is served, disclosure has been undertaken, defence statements are case specific and address the issues, appropriate admissions and summaries are prepared, special measures and evidential issues resolved and witnesses are required only if truly necessary with availability known to the court so as to avoid an ineffective hearing”: **Review of Efficiency in Criminal Proceedings** by Sir Brian Leveson, President of the Queen’s Bench Division (2015) para 38.

7. The parties must comply with the CPR and Court directions:



“The obligations of the parties under the Criminal Procedure Rules are clear. To differentiate between a failure to abide by a specific direction and a failure to follow the Rules would be to place an undue premium on the court making an order rather than expecting the parties to carry out their duties without such an order. Nor is it right to make a distinction in principle between a failure by the prosecution to serve evidence on time and the failure to make proper disclosure. Both have the potential to affect the fairness and orderly conduct of a trial and to undermine public confidence in the integrity of the criminal justice system”: **R v D S** [2015] EWCA Crim 662 para 42.

Case Management in Operation: A Judicial Perspective

8. Maintain direct contact with counsel throughout the trial process by email or other means in order to give directions, to receive documents and to reduce time spent in court where possible.
9. Matters to be agreed at PCMH: trial length; timetable for defence statements, opening note; admissions, batting order, ground rules and special measures if vulnerable witnesses, jury bundle, legal issues to be decided before trial.
10. Deal speedily with hearings between PCMH and trial by requiring skeleton arguments to focus on the issues to be decided.
11. Require compliance if any failure to comply with court’s directions and explanation for the failure.
12. At trial: jury questionnaire; shadow jurors to end of opening; maintaining trial length and batting order; dealing with legal issues; clarification of factual issues; no duplication of cross-examination; discussion of jury directions; if trial overruns, consider extending sitting times.
13. Sentence: opening note; defence response; provision of defence documentation prior to sentence.

Sanctions: Principle

14. “Ultimately, to be effective, robust case management relies on the ability of the court to ensure that its orders are complied with. In the event they are not, the court must rely on sanctions. it is clear to me that wasted costs and adjournments are no way to remedy the enduring problems in the system. Whatever we do, we must encourage a reduced tolerance for failure to comply with court directions along with recognition of the role and responsibilities of the Judge in matters of case management. It cannot be right that a ‘culture of failure’ has developed in the courts, fed by an expectation that deadlines will not be met. If a deadline (e.g. for service of a document(s) or an application) is not met,



there must be *good* reason for it and there must be an expectation that the party which failed to comply can provide that reason. A failure to tackle this culture leads to a general indifference to rule compliance. Whichever party has failed to comply or failed to meet the deadline, the opponent perceives objection as a waste of time because it will be largely pointless: there is no sanction that can be applied. Perhaps most significantly, it allows cases to 'drift', and for further hearings to take place unnecessarily." **Review of Efficiency in Criminal Proceedings** by Sir Brian Leveson, President of the Queen's Bench Division (2015) paras 198-199.

Sanctions in Operation

15. The Court of Appeal upheld the Crown Court judge's decision to refuse to allow evidence to be served late although it was clear such a decision would lead to the prosecution discontinuing the case. The prosecution's failures in relation to the provision of evidence were grave and in disregard of clear directions of the court: **R v Boardman** [2015] EWCA Crim 175.
16. The Court of Appeal allowed an appeal from the Crown Court's judge's decision on the eighth day of a trial to stay proceedings as an abuse of the process because of grave failures by the prosecution in relation to disclosure. Its reasons were that (1) there was a very strong public interest in the offences of rape, false imprisonment and sexual assault by both defendants being tried and the complainants having their allegations determined at trial; (2) the documents that were not disclosed were of limited materiality in contrast to the failure in **Boardman** to serve evidence; (3) a fair trial was possible: **R v D S** [2015] EWCA Crim 662.
17. "...the fact that this is the second occasion within two months that prosecution appeals have been brought to this court arising out of a failure to provide materials, the adequacy of the sanction needs greater consideration. As the failure relates to a failure in criminal procedure, we will ask the Criminal Procedure Rule Committee to consider whether any other sanctions can be imposed through new Rules on those charged with the prosecution of a case, and, in the absence of any power to provide for sanctions through new Rules, to set out whether any other steps or sanctions they consider should be taken to secure compliance with the Rules": **R v D S** [2015] EWCA Crim 662 at para 71.

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