HIGH COURT OF JUSTICIARY

Practice Note

No.1 of 2018

The Management of Lengthy or Complex Criminal Cases

1. This Practice Note takes effect from 10 May 2018.

2. There is widespread agreement that the length of the trials of complex crimes or trials involving multiple accused must be controlled within reasonable limits, both to make proper use of public resources and to enable the jury to retain and assess the evidence which they have heard. Save in exceptional circumstances, all trials, if properly managed, should be capable of completion within 3 months.

3. The Protocol set out in the schedule to this Practice Note has been agreed by the Crown, the Faculty of Advocates and the Law Society of Scotland.

4. It supplements the Criminal Procedure Rules 1996 and Practice Notes issued by the High Court of Justiciary. It summarises the good practice which experience has shown can assist in bringing about some reduction in the length of trials of complex crimes or involving multiple accused. The best handling technique for a long case is continuous management by an experienced judge nominated for the purpose. The judge should exert a beneficial influence by making it clear that, generally speaking, trials should be kept within manageable limits. In most cases 3 months should be the target upper limit. Intensive case management is likely to be needed to ensure this.

5. The Protocol will apply to cases which are likely to last eight weeks or longer. It may also be followed in suitable cases which are estimated to last for more than four weeks, and which have been identified by the Crown as likely to benefit from the measures included herein.

" CJM Sutherland"

Lord Justice General

Edinburgh

9 May 2018

SCHEDULE

PROTOCOL FOR THE MANAGEMENT OF LENGTHY OR COMPLEX CRIMINAL CASES

1. THE CROWN

Experience has shown that the involvement of the trial Advocate Depute at an early stage in the preparation of a complex trial is likely to result in effective identification of the essential components of the prosecution which in turn helps to ensure that the indictment is framed in a suitable way, with focus on the legal basis for the case, and that the appropriate witnesses and productions are identified at as early a stage as possible. Such an approach creates the best environment for ongoing management of the case. In fraud cases in particular it is important that the indictment has a structure which enables the key issues to be identified. It should be borne in mind that the use of schedules is likely to assist the simplification of the case, or the ease with which all involved may comprehend the issues set out in the indictment.

2. DESIGNATION OF THE TRIAL JUDGE

In any complex case which is expected to last more than eight weeks, the trial judge will be assigned at the earliest possible moment. The assigned judge must manage that case "from cradle to grave". Adequate reading time must be provided for this purpose, and to enable the judge to prepare for trial in due course.

3. DEFENCE

In the same way that it is important to identify the trial Advocate Depute and trial judge at the earliest opportunity, so too should defence counsel who will conduct the trial be identified as early as possible. Defence counsel will be treated as having responsibility to the court for the presentation and general conduct of the case. During the trial counsel should bear in mind the terms of PN No 3 of 2016.

4. STATEMENTS OF UNCONTROVERSIAL EVIDENCE AND THE DUTY TO AGREE EVIDENCE

It is particularly important in long trials, and the court will be particularly vigilant to ensure, that parties comply with their duties under section 257 of the 1995 Act.

An effective way for parties to comply with the duty to seek agreement of facts they seek to prove in their own case which they consider to be uncontroversial is to intimate, no later than 14 days before the preliminary hearing, a statement of uncontroversial evidence under section 258.

All parties are encouraged to consider the use of statements of uncontroversial evidence. If the Crown has not served a statement of uncontroversial evidence, an explanation should be requested. Challenges to statements of uncontroversial evidence will be scrutinized closely, bearing in mind the terms of section 258(4A) of the Criminal Procedure (Scotland) Act 1995.

5. CASE MANAGEMENT

i) Objectives

Effective case management of complex criminal cases requires the judge to have a much more detailed grasp of the case than may be necessary for many other preliminary hearings. The number, length and organisation of hearings will depend critically on the complexity of the individual case. However, thorough, well-prepared and extended preliminary hearings will save court time and costs overall. Unnecessary hearings should be avoided by dealing with as many aspects of the case as possible at the same time.

ii) Fixing the trial date

The trial date should not be fixed until the issues have been explored at a preliminary hearing. Only then can the length of the trial be estimated. It is understood that it will be apparent at a relatively early stage that a trial of some duration will be required. In such circumstances the trial Advocate Depute should be assigned at the earliest possible stage, for the purpose of managing the case. The Crown should notify the court that a case suitable for the operation of the protocol has been identified, in order that the case management, and other steps, identified herein may be initiated. Once a trial is fixed on the basis of the estimate provided, that estimate will be **increased** if, and only if, the party seeking to extend the time justifies why the original estimate is no longer appropriate.

iii) The Preliminary Hearing

Early identification of the relevant disputed issues is key to successful case management. The prosecution should provide an outline written statement of the prosecution case at least one week in advance of the preliminary hearing, outlining in simple terms:

- the key facts on which it relies
- the key evidence by which the prosecution seeks to prove the facts.

The statement must be sufficient to permit the judge to understand the case and for the defence to appreciate the basic elements of the case against each accused. The outline statement should not be considered binding, but it will serve an essential purpose in telling the judge, and everyone else, what the case is really about and identifying the key issues. The advocate depute should be given the opportunity to highlight any points from the prosecution outline statement of case.

A core reading list and core bundle for the preliminary hearing should be delivered at least one week in advance. This may be expanded during the process or case management, the end product being a core bundle for the use of the jury in due course, consisting of those documents to which frequent reference is likely to be made.

It is important that a proper defence statement be provided as required by the Section 70A of the Criminal Procedure (Scotland) Act 1995 Act. Each defence counsel should be asked to outline the defence for each accused. Early consideration should be given to the issues identified in this protocol to enable the preliminary hearing to operate as an effective case management hearing.

There should then be a real dialogue between the judge and all counsel for the purpose of identifying:

- the focus of the prosecution case
- the common ground
- the real issues in the case.

The judge will try to generate a spirit of co-operation between the court and the advocates on all sides. The expeditious conduct of the trial and a focussing on the real issues must be in the interests of all parties. It cannot be in the interests of any accused for the good points to become lost in a welter of uncontroversial or irrelevant evidence.

In many fraud cases, for example, the primary facts are not seriously disputed. The real issue is what each accused knew and whether that accused was dishonest. Once the judge has identified what is in dispute and what is not in dispute, the judge can then discuss with

the advocates how the trial should be structured, what can be dealt with by admissions or agreed facts, what uncontroversial matters should be proved by concise oral evidence.

Both parties should be encouraged to consider the use of statements of uncontroversial evidence.

iv) Consideration of the length of the trial

The length of trial should be that which is reasonable and appropriate for determination of the real issues in dispute. If the trial is not estimated to be within a manageable and appropriate length, it will be necessary for the judge to consider what steps should be taken to reduce the length of the trial, whilst still ensuring that the prosecution has the opportunity of placing the full details of the alleged criminality before the court. To assist the judge in this task, the Crown should be asked to explain why the prosecution has rejected a shorter way of proceeding; they may also be asked to divide the case into sections of evidence and explain the scope of each section and the need for each section.

The prosecution and the defence should be prepared to put forward in writing, if requested, ways in which a case estimated to last more than three months can be shortened, including: possible severance of the indictment by separating charges or accused; identifying areas of the case where admissions can be made; or exclusion of sections of the case or of evidence.

The judge must not usurp the function of the prosecution in this regard, must respect the responsibilities which lie upon defence counsel, and must bear in mind that at the outset, the judge will know less about the case than the advocates. The aim is to achieve fairness to all parties. The judge must make a careful assessment of the degree of judicial intervention which is warranted in each case. The intention is not for the judges to take control, but for the judge to direct and manage the efforts of those involved in a flexible way which assists identification of key issues, enables the trial to focus on the primary issues in dispute, and keeps the eventual trial within manageable limits.

v) Expert Evidence

Early identification of the subject matter of expert evidence to be adduced by the prosecution and the defence should be made as early as possible. Following the exchange of expert evidence, any areas of disagreement should be identified; together with any proposals for increasing the scope of any agreement.

vi) Surveillance Evidence

Where a prosecution is based upon many months' observation or surveillance evidence, and it appears that it is capable of effective presentation based on a shorter period, the advocate depute should be required to justify the evidence of such observations before it is permitted

to be adduced, either substantially or in its entirety. The focus should be on observations of relevance to the trial.

vii) Interviews

Where evidence is to be led of extensive police interviews, consideration should be given to the way in which such interviews may be edited, or the evidence relating thereto presented to the jury in a shortened form.

viii) Multiple Accused

Trials involving multiple accused raise their own special issues. These may concern the extent to which the same issues may need to be covered by different counsel, or the extent to which issues relating to notices of intention to lead incriminatory evidence may arise. To the extent possible, the judge should address these matters at the preliminary hearing.

6. DISCLOSURE

In fraud cases the volume of documentation obtained by the prosecution is liable to be immense. The problems of disclosure are intractable and have the potential to disrupt the entire trial process. Early and effective disclosure is central to the operation of this protocol.

The prosecution should only disclose those documents which are relevant (i.e. likely to form part of the Crown case, assist the defence or undermine the prosecution). The judge should therefore try to ensure that disclosure is focussed accordingly. This should be borne in mind in relation to any requests for further disclosure. For example, in many fraud cases the defence will know the nature of the documents which they seek, and from what source, and may be able to assist the court by providing a list which is specific, manageable and realistic. In non-fraud cases, it should be made clear to which issues the material sought relates, and its relevance. Defence counsel should draw to the attention of the court at the earliest opportunity any disclosure issue which impairs their ability to comply with any part of this protocol.

At the outset the judge should set a timetable for dealing with disclosure issues.

7. THE TRIAL

A heavy fraud or other complex trial has the potential to lose direction and focus. This is undesirable for three reasons:

- The jury may lose track of the evidence, thereby prejudicing both prosecution and defence.

- The burden on the accused, the judge, and indeed all involved may become intolerable.
- Scarce public resources are wasted.

It is therefore necessary for the judge to exercise firm control over the conduct of the trial at all stages.

i) The order of the evidence

By the outset of the trial at the latest (and in most cases very much earlier) the judge must be provided with a schedule, showing the sequence of prosecution (and, in an appropriate case, defence) witnesses and the dates upon which they are expected to be called. This can only be prepared by discussion between prosecution and defence. The schedule should be kept under review by the judge and by the parties. Experience suggests that the earlier this schedule can be produced, and particularly if it can be done prior to the first preliminary hearing the more effective management can be.

If an excessive amount of time is allowed for any witness, the judge can ask why. The judge may probe with the advocates whether the time envisaged for the evidence-in-chief or cross-examination (as the case may be) of a particular witness is really necessary.

The order of the evidence may legitimately have to be departed from. It will, however, be a useful tool for monitoring the progress of the case. There should be periodic case management sessions, during which the judge engages the advocates upon a stock-taking exercise: asking, amongst other questions, "where are we going?" and "what is the relevance of the next three witnesses?" as well as any other issues relating to presentation of the case. This will be a valuable means of keeping the case on track.

The judge may wish to consider issuing the occasional use of "case management notes" to the advocates, in order to set out the judge's tentative views on where the trial may be going off-track, which areas of future evidence are relevant and which may have become irrelevant (e.g. because of concessions, admissions in cross-examination and so forth). Such notes from the judge, plus written responses from the advocates can, cautiously used, provide a valuable focus for debate during periodic case management reviews held during the course of the trial. The sole purpose of these notes will be to assist in the management of the case.

ii) Controlling examination.

Setting rigid time limits in advance for examination or cross-examination is rarely appropriate but a timetable is essential so that the judge can exercise control and so that there is a clear target to aim at for the completion of the evidence of each witness. Recognising that a certain amount of scene-setting may be necessary, experience

nevertheless suggests that examination- in-chief is often highly repetitive and lacking in focus. The judge can and should raise this if it becomes an issue. Moreover the judge can and should indicate when cross-examination is unduly prolix, irrelevant, unnecessary or time wasting. The judge may limit the time for further cross-examination of a particular witness. Parties should bear in mind the terms of PN 2 of 2017.

Particular attention will be paid to whether it is necessary to replay sections of a video-taped interview which has already been played in full.

iii) Electronic presentation of evidence

Electronic presentation of evidence has the potential to save huge amounts of time in fraud and other complex criminal trials and should be used as widely as possible. Greater use of other modern forms of graphical presentations should be made whenever possible.

There should nevertheless be a core bundle of those documents to which frequent reference will be made during the trial. The jury may wish to mark that bundle or to refer back to particular pages as the evidence progresses. Electronic presentation of evidence can be used for presenting all documents not contained in the core bundle.

PDF copies of all productions should be provided to the judge if that is requested.

iv) Time to prepare defence case

Whilst it is recognised that, in some cases, the defence may require time to consider the Crown case before commencing the defence case this should be kept to as short a period as possible. Any period of longer than 24 hours will be exceptional.

v) Jury Management

The jury must be regularly updated as to the trial timetable and the progress of the trial, subject to warnings as to the predictability of the trial process.

If legal issues arise in the course of the trial legal argument should be heard at times that cause the least inconvenience to jurors.