"IT'S NOT MY CASE"

1. Introduction

This familiar escape clause will no longer do. The Criminal Procedure Rules 2005 (CrPR) came into force on the 4th April 2005 and with them a change in culture. The CrPR introduce into the criminal justice system the concept of "active case management". It is hoped that by active management, judges will ensure that criminal cases are dealt with "efficiently and expeditiously".

The CrPR are to be found in SI 2005 No.384 (L4); the statutory instrument is divided into 78 Parts, each part containing a number of rules. A detailed analysis of and guide to the rules is beyond the scope of this article; alas there is no substitute for reading them:

http://www.legislation.hmso.gov.uk/si/si2005/20050384.htm.

Let me treat you to an overview of the legislation and an examination of "active case management".

2. Overview

2.1 Rationale

We are familiar with rules of criminal procedure; rules which govern, for example, expert evidence, special measures, preparatory hearings, dismissal of charges, confiscation and indictments. Hitherto, they have been found in primary legislation, statutory instruments (almost fifty of them), local and national practice directions. The CrPR are the first step towards codifying criminal procedure for the Magistrates' Court, the Crown Court and the Court of Appeal (Criminal Division). The product, a single criminal code, will make the rules of criminal procedure more readily accessible than before.

However, the CrPR go further. They promote a change in culture; they introduce new rules which give criminal courts explicit powers and responsibility to manage cases. Such management will be "active", not passive. The thinking behind this new regime is not difficult to discern. In handing down *Amendments No. 9 (Jury Service) No.10 (Forms for use in Criminal Proceedings) & No. 11 (Case Management) to the Consolidated Criminal Practice Direction and A Protocol for the control and management of heavy fraud and other complex criminal cases*, on 22nd March 2005, Lord Woolf LCJ, speaking on behalf of a five-man Court of Appeal (Lord Woolf LCJ, Auld, Thomas & Hooper LJJs, Calvert Smith J) commented that active use of the case management rules will "reduce the numbers of ineffective hearings that cause avoidable distress to witnesses and inconvenience and expense to everyone" (*Notes to Amendment 11, paragraph 6(3)* - for a transcript see:

http://www.dca.gov.uk/criminal/procrules_fin/contents/pdf/transcript.pdf)

2.2 Format

Those familiar with the *Civil Procedure Rules* will recognise the style adopted in the drafting of the CrPR. Lord Woolf was behind those rules; now as Lord Chief Justice, he chairs the Criminal Procedure Rule Committee ("CPRC"). It is the CPRC that has vested in it the criminal procedure rule making powers once held by the Lord Chancellor and Crown Court Rules Committee. The CPRC was established by the Courts Act 2003, following recommendations in Lord Justice Auld's 2001 report, "*The Review of the Criminal Courts England & Wales*".

The rules are ordered so as to follow in broad terms the criminal process from "Preliminary proceedings", including for example committal and transfer to the Crown Court, indictments and preparatory hearings (Parts 7-17) through to "Appeal" (Parts 63-75) and "Costs" (Parts 76-78). There is a glossary and notes to help readers identify other legislation to which they may need to refer.

Obviously much is not new: you'll find special measures directions at Part 29, for example. Existing rules have been modified and improved: a preliminary hearing is not required in every case sent for trial under section 51 of the *Crime and Disorder Act 1998* (rule 12.2). Other parts reflect changes effected by the *Criminal Justice Act, 2003*, for example hearsay (Part 34) and bad character (Part 35). Further, some parts are incomplete: there are no rules, for example, on pre-trial hearing in the magistrates' court (9) or disclosure by the prosecution (22) or by the defence (23), save for expert evidence (see Part 24). We can expect the CPRC to attend to such areas in the near future.

The preceding paragraphs omit reference to Parts 1-6. Part 1 sets out the "overriding objective", while Part 3 contains the case management provisions.

3. "Overriding Objective" – Part 1

The "overriding objective" is "criminal cases will be dealt with justly" (rule 1.1(1)). Dealing with a criminal case justly includes "acquitting the innocent and convicting the guilty" (1.1(2)(a)), as well as "recognising the rights of a defendant" (1.1(2)(c)) and "dealing with the case efficiently and expeditiously" (1.1(2)(e)). There is nothing new here.

Rule 1.2(1) imposes on each participant in the conduct of each case a duty to:

(a) prepare and conduct the case in accordance with the overriding objective; (b) comply with the 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 the rules. "Anyone involved in any way in a criminal case is a participant in its conduct for the purposes of this rule" (1.2(2)). The rule will apply not only to legal representative but also, for example, to the defendant, witnesses and third parties, such as those holding medical records and social services files.

The above changes nothing in relation to the rules regarding legal professional privilege or indeed to the professional duty to a lay client. Nor does it detract from the defendant's right to silence. We shall see whether we are required to inform the

court "at once" when our lay client fails to attend for conference or a police officer fails to deliver unused material ordered to be disclosed.

The court must further the overriding objective, in particular when "exercising any power given to it by legislation" including the CrPR or "when applying any practice direction or interpreting any rule or practice direction", (1.3). It is by actively managing the case that the court furthers the overriding objective (3.2(1)).

4. Case Management - Part 3

4.1 The Rules

Part 3 applies to all proceedings in the Magistrates' and Crown Courts, (rule 3.1). It sets out the principles of case management. Rule 3.2(2) provides that 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.

The court "must actively manage the case by giving any direction appropriate to the needs of that case as early as possible" (3.2(3)). Rule 3.3 imposes a duty on the parties to assist the court with or without a direction.

The court powers are extensive: "in fulfilling its duty under rule 3.2 the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation" including the CrPR (3.5(1)). In particular, the court may:

(a) nominate a judge, magistrate, justices' clerk or assistant to a justices' clerk to manage the case;

(b) give a direction on its own initiative or on application by a party;

(c) ask or allow a party to propose a direction;

(d) for the purpose of giving directions, receive applications and representations by letter, by telephone or by any other means of electronic communication, and conduct a hearing by such means;

(e) give a direction without a hearing;

(f) fix, postpone, bring forward, extend or cancel a hearing;

(g) shorten or extend (even after it has expired) a time limit fixed by a direction;

(h) require that issues in the case should be determined separately, and decide in what order they will be determined; and

(i) specify the consequences of failing to comply with a direction.

Rule 3.5(2)

At the beginning of a case each party must, unless the court directs otherwise, nominate a case progression officer and inform other parties and the court of that person's name and how he/she may be contacted. That person is responsible for progressing the case, (3.4(1)), which responsibility includes monitoring compliance with directions (3.4(4)(a)). Where appropriate, there will be a court case progression officer.

The parties may agree between themselves to vary a time limit fixed by the court. This is not a licence for non-compliance for the variation must not affect any fixed hearing date or "significantly affect the progress of the case in any other way". In any event it is subject to the all-seeing eyes of the court progression officer.

Rule 3.9(2)(a) requires that each party must comply with court directions. By virtue of 3.9(2)(d) each party must "promptly inform the court and all other parties "of anything that may (i) affect the date or duration of the trial or appeal, or (ii) significantly affect the progress of the case in any other way". Certificates of readiness are still with us, (3.9(3)).

Rule 3.10 is significant. It provides that "in order to manage the trial or (in the Crown Court) appeal, the court may require a party to identify" - which witnesses he intends to give oral evidence and the order in which they will be called; what arrangements have been made to facilitate the giving of that evidence; what written evidence he intends to introduce; whether he intends to raise any point of law that could affect the conduct of the trial or appeal; and what timetable he proposes and expects to follow.

Consideration of the issues identified above will be driven by the use of a case management hearing form; the form will be used at the plea and case management hearing ("PCMH").

4.2 Implementation

Amendment No. 11 to the Consolidated Criminal Practice Direction (Case Management), amended the *Practice Direction (Criminal proceedings: Consolidation)* [2002] 1 WLR

2870 ("*Consolidated Practice Direction*"). The amendment was effected by substituting a new paragraph 41 of Part IV thereof; by the addition of a further paragraph to Part V and by the addition of Annex E; it is Annex E that contains the PCMH form, which will be used under rule 3.11(1). If, like me, you spent Easter on holiday with friends and family, you will have read the aforementioned *Amendment No. 11 to the Consolidated Criminal Practice Direction (Case Management)* ("*Amendment No. 11*"): it (helpfully) appeared in *The Times* on Easter Monday. For those who did not, the following links should take you to *Amendment No. 11* & to the PCMH form –
Amendment No. 1:
http://www.dca.gov.uk/criminal/procrules_fin/contents/pdf/pd_amd_11.pdf

Form:
http://www.dca.gov.uk/criminal/procrules_fin/contents/pdf/f96page1-11.pdf

Amendment No. 11 took effect on 4th April 2004, the day upon which the CrPR came into force. The practice direction applies to any case sent, committed or transferred for trial on or after that date.

Use of plea and case management hearing forms is to be piloted at the Central Criminal Court and in the Crown Courts at Preston and Nottingham. The fact that use of the forms will be piloted at those specified centres does not mean that other courts will not be subject to the CrPR. As Lord Woolf made clear on 22nd March 2005, the distinction between pilot and 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 prosecution and the defence"). By contrast, in non-pilot centres, unless there is agreement between local criminal justice agencies and practitioners, judges will use the PCMH form as a checklist to "ensure that all the necessary directions are given" (*Notes to Amendment 11, paragraph 19*).

4.3 Impact

We may not have to complete the form, but we'll have to do the work. The new system will demand greater levels of preparation by advocates and those who instruct them. That preparation will be required much earlier than under the present regime. The parties will have to be "almost trial ready" at the PCMH. At that hearing advocates will be required to complete the very detailed questionnaire, addressing and answering the issues raised. PCMHs will take much longer than existing plea and directions hearings. The questionnaire comprises six pages, including two annexes. The questionnaire addresses some twenty-five subject areas. The court will want to know, for example, the real issues in the case ("guilt" will not appease even the most "traditional" of judges); which witnesses are required and why ("abundance of caution" will not do); make orders in relation to the preparation of schedules and formal admissions for service and agreement well in advance of the trial; and the drawing up of a trial timetable. None of this will be possible without full and detailed instructions: for those who defend, conferences, signed proofs and comments; those who prosecute, full instructions on and particulars of additional evidence and further outstanding inquiries.

The now amended (i.e. by *Amendment No.* 11) paragraph 41.8 of the *Consolidated Practice Direction* recognises that the effectiveness of such hearings depends on prior preparation and upon the presence of the trial advocates. Significantly, it requires

that "resident judges, in setting the listing policy, should ensure that list officers fix cases so far as is possible to enable the trial advocate to conduct" the PCMH and the trial.

Thereafter, there may be further directions issued without further hearing, of the court's own motion or sought by telephone, letter or email (3.5(2)(b), (d)). That rule 3.5(2)(h) requires that issues in the case should be determined separately and opens the door possibly to more pre-trial hearings to resolve such issues as severance or admissibility.

4.4 More work, more money?

No. Well in fairness, not yet. Lord Woolf observed that "an area of great concern to defence practitioners has been that it has proved impossible to arrange the way in which they are to be rewarded for their professional services…the Department of Constitutional Affairs has recognised the need for an adjustment" (*Notes to Amendment 11, paragraph 19*). As the Lord Chief Justice commented such matters are "extremely complex"; as yet, no "adjustment" to the present remuneration scheme has been made. Negotiations with the Department of Constitutional Affairs continue. Judges are said to be aware of this and sympathetic: whatever the extent of such sympathy I am not sure how that will help the ever-more-put-upon practitioner.

5. Conclusion

There is much to commend the CrPR. The Bar Council and Law Society support the changes. A single criminal procedure code is long overdue. The principle of active case management designed to produce a more efficient and effective criminal justice system is to be welcomed.

6. Postscript

Those readers familiar with the last article I produced for the Crime team newsletter might recall my fondness for lobster. The world of active case management has no place for crustacea: now we're dancing with Woolf.

Chris Quinlan