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Albion Chambers CRIME TEAM NEWSLETTER

A tug of war

It has become increasingly clear that there is a tension between the judiciary and the Bar, when the judge sets a timetable under the Criminal Procedure Rules 2010 (CPR).

The rules have highlighted the need for judges to take control of the entire trial process. The amendments which came into force in October 2010 extended that duty, not only to the setting of a timetable but also to limiting the duration of any stage of proceedings. That obviously includes the possibility of setting a limit to the amount of time allocated for the cross examination of witnesses, closing speeches and legal argument.

The need for courts to be run more efficiently became all too apparent following the exposure of the country's parlous economic state and the associated need to save money. In that context time is very obviously money. However, that imperative must not be slavishly followed at the expense of justice. As much as the setting of a timetable is good practice as well as a good discipline for all advocates to learn, it should always be done with the practicalities of the trial process in mind. That means that as a "live event" a trial is by necessity a very moveable feast which in Rumsfeld terms means it contains unknown unknowns. Almost every case will throw up unforeseen issues such as late disclosure, additional evidence or unexpected matters raised in the witness box, difficulties with a member of the jury or even simply the fact that other matters listed before the trial mean that it has a late start.

All of those matters and more will affect any timetable that has been set and so as the Lord Chief Justice has stressed, any timetable has to be flexible. Additionally, any consequent alteration or amendment has to be administered fairly. The injustice to a defendant of a trial being unexpectedly lengthened and his evidence or that of his witnesses being curtailed as a result is obvious.

Equally, in a sex or domestic violence case where a wealth of social services and other records had not been disclosed at the time of the PCMH when the estimate was given, the defendant's case would be severely prejudiced if his advocate were prevented from cross-examining the complainant on each of the relevant matters because to do so would materially extend the original time estimate. The risk of prejudice applies equally to the Crown as it does to the defence. In such a case, the defence advocate, having been given the opportunity to cross-examine in respect of the relevant records, it would be unfair, if (simply because of the time it took to do so) the judge put a guillotine on the Crown's cross-examination of the defendant. The better course would be to advise the court, in advance of the trial, that the original estimate has been superseded by the disclosure of new material or service of additional evidence and to provide a more accurate one.

That course, notifying the court in advance of any difficulty, is one that has been advocated by many Crown Court judges. Thus, if a psychiatric report needs to be obtained prior to the PCMH, the court is much more likely to be sympathetic to a request for an adjournment or additional time if they have been notified of that fact before the date of the hearing. Equally, if the Crown is late serving the papers which means that any timetable set for the service of defence statements and witness requirements becomes impossible to meet, notification of that fact at the earliest stage is more likely to be met with a favourable response than one made on the day.

It is the provision of defence statements that has brought the tension between the Bar and the judiciary into the sharpest focus. Of course, no court wants an ineffective PCMH; that is a waste of everyone's time, not least the defence advocate who does not get paid for such attendances. Yet the insistence that an effective PCMH cannot be held without a defence statement is equally counter-productive to the need to save time and money.

If the system works smoothly, the Crown would serve the papers in such time as to allow the defence advocate to be identified and briefed, the papers to be read, the issues to be identified, a conference held and if necessary, the defence statement to be served. Built into that process is obviously the need for a proof of evidence and the comments on the evidence to be taken from the client.

That timetable is also based upon the assumption that the client attends when asked to do so (or an appointment is available at prison within the time available) and provides full instructions.

But as anyone dealing with the Criminal Law knows, that set out above is the exception rather than the rule. Of course, if it is simply an issue that the papers are served late, the defence solicitor should contact the court and seek to have the date for the PCMH moved back administratively. But if the solicitor requests that the defence statement is drafted by counsel both the court and the solicitor has to accept that a signed proof of evidence and ideally comments on the evidence have to be provided to counsel before that can be done. It is insufficient for the court to suggest putting the matter back to the afternoon in order for counsel to draft the statement.

If counsel has the material to enable him or her to draft the defence statement then he or she will be able to identify the issues to the court and set them out in the relevant box on the PCMH form. The witness requirements will be known as

will the need for any defence expert to be instructed or witnesses to be called on behalf of the defendant. All of that can be dealt with at the PCMH together with a direction that the defence statement be drafted and served within a specified time. The consequence of the alternative scenario (and that contemplated by many judges) namely that of counsel taking instructions from a defendant at court and then hurriedly drafting a Defence Statement is obvious. It would only take the defendant to be cross-examined about the content of a defence statement drafted by the counsel representing him at trial to potentially cause a jury to be discharged. The Bar Counsel Guidance reviewed in January 2011 makes plain the steps that any barrister has to comply with before drafting a defence statement. (see Archbold 12-99). These include obtaining all prosecution statements and documentary exhibits, getting instructions from the lay client, from a properly signed proof and preferably a conference, getting statements from other material witnesses, ensuring that the client realises the importance of the Defence Statement and the potential adverse consequences of an inaccurate or inadequate statement, getting proper informed approval for the draft from the client. It is clear from that guidance and in contrast to the tenor of the judges that counsel ought not to accept any instructions to draft or settle a Defence Statement unless they have been given the opportunity and adequate time to gain proper familiarity with the case and to comply with the fundamental requirements set out above. As the Bar Council makes plain there is no halfway house; if instructions are accepted, then the professional obligations on counsel are considerable.

Everyone within the Criminal Justice System is working to the extent of their limit; counsel are drafting more and fuller documents both for the defence and the Crownand the pressures upon the Bar, the CPS and defence solicitors in time and staff resources are increasing all the time. No-one is being properly paid for all they are expected to do.

All of the current cost-saving measures designed to save money are fraught with difficulty and the potential for disaster. The barrister who hurriedly drafts a document without proper instruction risks at best, the threat of a Wasted Costs Order; or worse still, a professional complaint, or proceedings before the Bar Standards Board.. The solicitor who doesn't send anyone to court risks the LSC cutting that element from the litigation fee(something that rumour has it is a very real likelihood). The CPS who rely upon the goodwill of counsel may find that the wrong box has been ticked on a form and that a custody time limit is missed or that a trial has to be aborted because they are not there to speak to a witness. Worse still the task of a caseworker is undertaken by a police officer who finds himself drawn into talking to the witness about the evidence. The CPS lawyer who under pressure of time delegates the duty of disclosure to the police officer who does not appreciate the issues in the case may cause late or worse, non-disclosure of vital evidence which again will undoubtedly result in the jury being discharged and a Wasted Costs Order being imposed upon the CPS.

All of those matters are a question of balance; the need to save money at one end and the requirement for justice at the other. That being the case it is essential that those entrusted to represent defendants in a system under pressure in that way have an even higher duty to ensure that the system is administered fairly. It is hoped that judges who have so often stood up for that right will not change now.

Sarah Regan

The Chambers, the Bank and the missing Postal Order

A brief research into the history of Albion Chambers reveals that the building was built in 1843 with the first barrister taking up residence the following year. Over the course of the following three years the Bank of England built its Greek revival style premises at 13/14, Broad Street, immediately adjoining Albion Chambers. Following its completion in 1847 the manager or agent lived in the building together with his wife and any family. One of the agents was a man called Martin Archer-Shee and on the 6th of May 1895 his son George Archer-Shee was born in the Bank. Thirteen years later in 1908 George became a cadet at the Royal Naval College, Osborne. The College, set in the grounds of Queen Victoria's favourite home on the Isle of Wight provided the first two years training for Royal Naval cadets from the age of 14 to 16.

On the morning of 7th February 1908 one of the cadets by the name of Terence H Back received a postal order for five shillings. Having placed it in his locker that morning when he went to retrieve it at 3:45 that afternoon Back found the postal order missing. George Archer-Shee had the misfortune to share the bed next to Back and so suspicion quickly fell onto him. That suspicion mainly came from the fact that having been questioned by Commander Cotton, Miss Tucker the local post mistress stated that at about 3:00 on that afternoon a cadet had asked her to cash a postal order for five shillings. The order was endorsed Terence H Back and the cadet had then bought another postal order for fifteen and sixpence.

That afternoon George Archer-Shee had indeed bought a postal order for fifteen and sixpence but he consistently denied that he had been the male who had cashed the five shilling order. In an attempt to resolve the matter seven cadets were paraded in front of Miss Tucker but she was unable to identify any one of them as the male responsible for the transaction. Despite that she was certain that it was the same male who had cashed the five shilling order and bought the order for fifteen and sixpence.

Commander Cotton during his questioning of Archer-Shee asked him to write out in his own hand the name that had been endorsed on the postal order; Terence H Back. A handwriting expert subsequently concluded that the same hand was responsible for both. As a result Mr Archer-Shee senior was told that his son was to be expelled from Osborne which elicited the response "nothing will make me believe the boy guilty of this charge, which shall be sifted by independent experts."

As good as his word Martin Archer-Shee instructed a firm of lawyers to prove his son's innocence and together with George's elder half-brother, also named Martin and an MP one of whose colleagues was Sir Edward Carson KC, MP managed to engage the services of the most successful silk of his day.

Edward Carson's many celebrated cases included his prosecuting Oscar Wilde

but he also had a son who had been to Osborne. However, before he accepted the brief Carson subjected George to cross-examination in order to test the veracity of his story. Having satisfied himself of George's innocence Carson agreed to take the case.

However, the legal difficulties that had to be overcome in order to lay the facts before a judge and jury were considerable. As a cadet, at that time, it was impossible for Archer-Shee to bring a civil action and thereby sue the Crown. However, he was also excluded from courts martial and so Carson was forced to bring a Petition of Right against the Crown. The Court of Appeal duly sent the case for trial yet it was a further two years before the case came before Mr Justice Phillimore and a special jury on 26th July 1910.

The Crown was represented by the Solicitor-General, Sir Rufus Isaacs KC, MP, who opened the case on the basis of a single question "was the boy who bought the fifteen and sixpenny order the same boy who cashed the stolen order? ...what you have to determine is whether the boy or the post mistress is telling the truth."

Carson began the opening of his case by saying "A boy 13-years-old has been labelled and ticketed for all his future life as a thief and a forger. Gentleman, I protest against the injustice to a child, without communication with his parents, without his case ever being put, or an opportunity of its ever being put forward by those on his behalf. That little boy from the day that he was first charged, up to this moment, whether in the ordeal of being called in before his Commander and his Captain, or whether under the softer influences of the persuasion of his own loving parents, has never faltered in the statement that he is innocent."

Carson's cross-examination of the post mistress Miss Tucker was a master class on the subject. First he ascertained that the post office books offered no assistance in respect of the crucial issue, the order of the cashing and issuing of the two postal orders or the person/s responsible and that for that the court was reliant upon Miss Tucker's own memory. He then got her to agree that all of the cadets looked "pretty much" alike and that she wouldn't, if called away from the counter, notice if the boy she had been serving had been replaced by another boy. Finally, he took her through the customers on that day getting her to agree that she could recall the appearance of none of them, the number of customers that day and that before his questioning she had never been asked to recall whether anyone other than a cadet had been into the post office that day.

Other witnesses included Cadet Back who said that Archer-Shee had not to his knowledge ever seen the postal order and a Chief Petty Officer who confirmed that there had been other thefts both before and after Archer-Shee's expulsion. All of that resulted in a surprise development on the fourth morning of the trial when Sir Rufus Isaacs addressed the court stating "As to the issues of fact, the court and the jury will not be further troubled..." That statement vindicated Archer-Shee and as Sir Rufus Isaacs finished, members of the all male jury clambered from their box to congratulate Mr Martin Archer-Shee and Sir Edward Carson soon after followed by members of the Bar and the general public.

That very public vindication was followed by a debate in the House of Commons which agreed to pay a sum of £7,120 to Mr Martin Archer-Shee by way of costs and compensation. However, the case does not appear in The Law Reports, having been decided on a question of fact and not law.

For the innocent George Archer-Shee fate was not so kind. He chose not to return to the naval college but to Stonyhurst where he had been educated before Osborne. After school he travelled to the United States where he worked for Fisk and Robinson on Wall Street. He returned home to enlist in the British Army at the start of World War I, but was killed at the first battle of Ypres in 1914. He was aged just 19 and it seems that he joined the South Staffordshire Regiment at the suggestion of Edward Carson whose nephew F E Robinson had joined the same regiment shortly before. Indeed, their names can be seen close together on tablet 35 of the Menin Gate in Ypres, Teddy Robinson having been killed only three days before Archer-Shee.

George Archer-Shee's name is also recorded on a plaque at St. Mary-on-the-Quay, Bristol and inscribed on the war memorial in North Woodchester in Gloucestershire which was where his parents lived.

He has also been remembered both on stage and film as Terence Rattigan used this case as the basis for his famous play "The Winslow Boy", which has also been filmed twice.

Nicholas O'Brien

Editor's note

This edition of the Newsletter has, albeit unconsciously, had the theme of belief; Carson's belief in the innocence of George Archer-Shee and the belief of those tasked with the business of prosecuting or defending in justice.
And in each case it means putting your case and your duty to your client, where necessary, over and above the concerns of expediency or cost.
That may feel a hard and thankless task when it appears as if our very ability to even do the most basic job is being challenged at every level. Those of us who prosecute are required to apply to be included on the new CPS Panels. Defence fees, in addition to prosecution fees are being cut and we know not what we face next year; BVT, One Case One Fee or carry on as before. The structures of the Sentencing Guidelines make it appear pointless to attempt to achieve a sentence outside of that tight framework.

Yet all of those things can be used to our advantage. Criminal practitioners have never chosen Crime for the level of its remuneration or the ease of practice. Long gone are the days when practitioners in other fields thought of criminal lawyers as specialising in Crime because they were intellectually incapable of practising in any other area of law. The ever-increasing and constantly changing legislation and the minefield of, for instance s. 75 of the Sexual Offences Act 2003 or as Archbold News referred to it, the tortuous considerations which must be undertaken in applying the overly complicated jurisprudence in relation to s. 34 (CJPOA 1994) and a *Lucas* direction have put paid to that line of thought.

It is that rigorous intellectual ability combined with the reason we all came into crime which will undoubtedly see us through yet another period of disquiet and insecurity. No-one wants a criminal lawyer until they need one. It is a thankless job and one that does not attract glamorous headlines when it comes under attack as it now undoubtedly is. By carrying on as we always have, by acting to present the best case that we can, whether prosecuting or defending, despite all of the hurdles we face day-in, day-out we will demonstrate that whichever limb of the profession we come from we are essential to ensuring that justice (that unfashionable phrase) is achieved.

Sarah Regan

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Ignatius Hughes QC
Call 1986
QC 2009
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Adam Vaitilingam QC
Call 1987
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Recorder

Christopher Jervis
Call 1966

Timothy Hills
Call 1968

Nicholas O'Brien
Call 1968

Paul Grumbar
Call 1974
Recorder

Nicholas Fridd
Call 1975

Martin Steen
Call 1976
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Robert Duval
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Call 1992

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Giles Nelson
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Jason Taylor
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Kirsty Real
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Kannan Siva
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Kate Brunner
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David Chidgey
Call 2000

Sarah Regan
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Richard Shepherd
Call 2001

James Cranfield
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Anna Midgley
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Monisha Khandker
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Simon Emslie
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Philip Baggley
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Emily Brazenall
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