NOTE ON JUDICIAL REQUESTS TO DRAFT DEFENCE STATEMENTS AT PCMH

INTRODUCTION

In recent months reports have reached the CBA Committee concerning Judges who, purporting to act under their case management powers, demand~~ing~~ the immediate service of a defence statement ('DS') when the PCMH is listed, if one has not been served already. The ad hoc sanction for the failure to comply is to be put to the back of the day's list, or worse still, for the PCMH to be adjourned to another date with the threat of wasted costs. This is causing understandable disquiet among members, who are generally not at fault for the failure to produce a DS by the time of a PCMH, and it may be appropriate for the CBA to make representations to the judiciary and offer advice to its members.

THE DEFENCE STATEMENT

The CPIA 1996, ss 5(5) and (6A) require the service of a DS which:

(a) sets out the nature of the accused's defence including any particular defences on which he intends to rely;

(b) indicates the matters on which issue is taken with the prosecution;

(c) sets out in respect of each matter why issue is taken;

(ca) sets out particulars of matters of fact on which he intends to rely for the purposes of his defence; and

(d) indicates any point of law he intends to take together with authorities in support.

CPIA 1996, s 11(2) prescribes the circumstances in which sanctions for non-disclosure might arise. These are (broadly):

(1) failure to serve or the late service of a defence statement: s 11(2)(a)–(d);

(2) a defence statement with inconsistent defences: s 11(2)(e);

(3) a defence advanced at trial not mentioned in or different from the defence statement: s 11(2)(f)(i);

(4) reliance on matters of fact not mentioned in the defence statement: s 11(2)(f)(ii);

(5) late service of a witness notice: s 11(4)(a); and

(6) calling a witness not included or inadequately identified in a witness notice: s 11(4)(b).

The sanctions under s11(5) are:

(1) Comment by the court or other party
(2) Adverse inference

These sanctions are exhaustive: *R v Rochford*.

CRIMINAL PROCEDURE RULES

The broad framework of the CPR is as follows. The overriding objective is that criminal cases are dealt with 'justly': r1.1(1). That includes dealing with cases 'efficiently and expeditiously': r1.1(2)(e). The court must seek to further the objective (~~:~~ r1.3) by 'active case management' (~~:~~ r3.2(1)), which itself includes 'early identification of the real issues'~~:~~ (r3.2(2)(a)), early setting of a timetable~~:~~ (r3(2)(c)) and discouraging delay (r3.2(2)(g)). These aims are to be achieved by giving appropriate directions: r3.2(3) & r3.5.

Equally, dealing with cases justly includes ensuring that defendants are dealt with fairly (r1.1(2)(b)) and recognition of the rights of a defendant, particularly those u~~U~~nder Article 6: r1.1(2)(c). In this context Art 6(3)(b) affords an accused the right to 'adequate time and facilities for the preparation of his defence'. Moreover the overriding objective has to take account of the gravity of the offence, the complexity of what is in issue and the severity of the consequences to a defence and others affected: r1.1(2)(g).

Each participant must prepare and conduct the case in accordance with the overriding objective and in compliance with the procedure rules, practice directions and directions of the court: r1.2(1)

COUNSEL'S DUTIES & BAR STANDARDS BOARD GUIDANCE

The Code of Conduct states that Counsel 'has an overriding duty to the Court to act with independence in the interests of justice' (~~:~~ para 302) and must 'promote and protect fearlessly and by all proper lawful means the lay client's best interests' para 303(a). A barrister must not undertake any task which s/he (i) knows or ought to know s/he is not competent to handle, (ii) does not have adequate time and opportunity to prepare or perform: para 701. (See also Bar Standards Board's guidance, para 5)

More pertinently, the Bar Standards Board has issued specific guidance in the preparation of DS's, last reviewed on 9 March 2011. The guidance recognises the 'great importance' of the documents and that an 'inaccurate or inadequate DS could have serious repercussions for the defendant' at trial. It also recognises that, given the time frame for service (now 28 days from primary disclosure) it will normally be more appropriate for instructing solicitor to draft the defence statement. However where counsel accepts the trial brief, this will include all necessary preparation including (if so instructed) drafting or settling the DS.

The guidance reminds counsel to recognise the crucial importance of:

i) ~~i)~~ obtaining all prosecution statements and documentary exhibits, getting instructions for the lay client from a properly signed proof and / or having advised the lay client in conference in order to set out the necessary contents (nb: the guidance omits what is often most difficult aspect: 'particularising

matters of fact on which the defendant intends to rely', an ~~is~~ amendment inserted by CJIA 2008)

ii) getting statements from other material witnesses
iii) the client realises the importance of the DS and the potential adverse consequences
iv) advising of the statutory obligation to provide one
v) getting informed approval including written acknowledgment that s/he understands the importance of accuracy and adequacy and has had the opportunity to consider and approve its content.

A barrister who is not retained for the trial, and therefore for whom no fee would be payable (assuming as above that the trial advocate's fee necessarily includes the drafting of a DS if instructed) is under no obligation to accept work for no payment.

Finally the guidance advises that ~~'~~counsel should not accept any instructions to draft or settle a DS unless given the opportunity and adequate time to gain proper familiarity with the case or to comply with the fundamental requirements set out above. In short there is no half-way house. If instructions are accepted, then the professional obligations are considerable. This assumes instructions from a solicitor. Quaere a CPR direction from the judge?

Counsel cannot advise a client not to submit a DS: see: *R v Rochford* above.

REAL & PRACTICAL DIFFICULTIES

In the circumstances outlined in the first paragraph of this note, a number of real problems can arise. These include any or a combination of :

1. Counsel is not instructed by his solicitor to draft a DS
2. Counsel is not the instructed advocate
3. Counsel has incomplete prosecution papers
4. Counsel has no proof of evidence
5. The prosecution case is voluminous and / or complex
6. The defence case is complex and / or very detailed
7. The client is unable to provide extemporary instructions
8. The client is unwilling to provide extemporary instructions

There is a significant danger in~~f~~ drafting an inaccurate or incomplete DS, both to the lay client and to counsel. The lay client may be cross examined on the minutiae of its content or on omissions. Having undertaken the task of drafting, c~~C~~ounsel may be accused of negligence for any failure of~~ion~~ accuracy or completeness.

WHAT CAN THE CBA DO

The CBA should attempt to rein in the worst and most unreasonable excesses of martinet judges by pointing out the commonplace difficulties highlighted in this paper and commending some common sense and a bit more than lip service to the rights of a

defendant.

Some defence cases can be very simply and economically explained. Others, even for superficially straightforward allegations, may require thorough reading of prosecution material and painstaking instruction taking. Often, even where the prosecution papers are complete, it is not even possible to discern the its case in the absence of a case summary (because of the manner in which it has been assembled or different / contradictory possible interpretations).

There is surely a distinction to be made between providing sufficient information at an early stage to identify to the Court and Crown ~~what t~~the issues in the case on the one hand and providing details of particulars of matters of fact on which a defendant~~he~~ intends to rely. The primary purpose of the DS is to prevent an ambush defence. Good trial management will not suffer if, where genuine difficulties arise, all that is required is a statement of the general nature of the defence and perhaps the (prominent) factual issues taken with the prosecution.

It may be that an approach to the Council of Judges or, as discussed at the Committee meeting, individual Resident judges may be appropriate.

Should the CBA seek to strengthen the guidance issued by the BSB?

WAYS FORWARD FOR COUNSEL

It should be remembered that a defendant cannot be compelled to provide a DS, although there is a statutory obligation on him to provide one. I~~However, i~~n the myriad circumstances in which a demand is made that a~~s~~ DS is supplied on the day of a PCMH, some of the following suggestions may be helpful. Whether or not these are workable may depend upon the understanding and / or reasonableness of the individual judge:

1. Consider whether the time limit for service has expired; this is frequently the case!~~-~~ If it has not, no obligation arises.
2. Consider whether instructions have been given to draft a DS. They may be within the brief to counsel (if that exists). If not, ~~within~~ it may be necessary to telephone the solicitor.
3. Invite the court to grant further time (albeit the potentially adverse consequences of late service have already arisen).
4. Explain the difficulties /complexities of the case.
5. Remind the court of counsel's Code of C~~c~~onduct / explain that to comply with the order would render counsel in breach of the Code.
6. Advise the client as to the ramifications of failing to submit a DS there and then and of submitting a DS which is inaccurate or incomplete. Get written instructions either way.
7. Provide a very basic DS setting out the central areas with which issue is taken and ensure that whoever is to be responsible for the conduct of trial appreciates the need for an updated DS.

8. Mark the DS with a rider that its ~~hasd~~ been prepared at short notice / with insufficient time to prepare / in breach of Art 6.~~/~~
9. If the advice is that it would not be possible properly and in accordance with one's professional duties to draft a DS for any of the reasons (ie not advise the client not to submit a DS, but not to submit one that day and the client instructs accordingly,) ultimately one can refuse to draft a DS. As for the client, either the time for service has not expired in which case no sanction is permissible; or ~~Or~~ it has expired and a further short delay while counsel gets on top of the papers or they are returned to the instructed advocate to draft is unlikely realistically to worsen the defendant's position. (Is anyone aware of any case in which a DS that was a little late was the subject of adverse comment or inference **[NO]**. Unless there is a tactical decision to await some further evidence eg forensics, what could the comment or inference be? How could the prosecution (who are never late in serving material) or a co-accused be handicapped or prejudiced if a DS was provide late but within a reasonable time of trial?