



The Right Honourable Lord Mackay of Clashfern

Commercial Fraud Trials: Some Recent Developments



James Peter Hymers Mackay
(b. 2 July 1927)

Lord Mackay of Clashfern, Lord Chancellor 1988–1997, was born James Peter Hymers Mackay in Edinburgh on 2 July 1927.

He was educated at George Heriot's School, Edinburgh and at Edinburgh University, where he graduated with a Masters in Arts with Honours in mathematics and natural philosophy. He then lectured in mathematics at the University of St Andrews and did post-graduate work in mathematics at Trinity College, Cambridge.

Lord Mackay graduated from Edinburgh University with an LLB in 1955, and in the same year, he was admitted to the Faculty of Advocates (the Scottish Bar). He became a Queen's Counsel in 1965. In 1976 he was elected Dean of the Faculty of Advocates (leader of the Scottish Bar). From 1976–1979 he was also a part-time member of the Scottish Law Commission.



In 1979, the Prime Minister (Mrs Margaret Thatcher) invited Lord Mackay to become Lord Advocate. The Lord Advocate is the Senior Law Officer of the Crown for Scotland in charge of all public prosecutions in Scotland, as well as legal adviser to the Government. He became a Life Peer in the same year. In 1984 Lord Mackay was appointed a Senator of The College of Justice in Scotland (ie, a Member of the Court of Session, Scotland's highest court).

In 1985 he became a Lord of Appeal in Ordinary, one of the two Scottish members of the Appellate Committee in the House of Lords. In October 1987, Mrs Thatcher appointed him as the Lord Chancellor, and a member of her Cabinet. This unprecedented appointment of a “non-English” lawyer as head of the English judiciary and legal system was a singular honour for Lord Mackay, and a mark of the respect in which he was held—both by the judiciary and by his political colleagues.

His ten years as Lord Chancellor were turbulent and controversial as he pushed through fundamental reforms to the English legal profession, for instance, the abolition of barristers' monopoly rights to plead in the higher courts. One of the leading cases he heard in the House of Lords was *Pepper v Hart* [1993] 1 All ER 42, HL, where he delivered the sole dissenting judgment.

Among the judgments delivered by Lord Mackay in the Privy Council on appeal from Malaysia are *Manilal & Sons (M) Sdn Bhd v Mahadevan Mahalingam and Another* (1986) 4 PCC 535 (a case dealing with limitation of actions); and *Peter Anthony Pereira and Another v Hotel Jayapuri Bhd and Another* (1986) 4 PCC 563 (a case dealing with contracts of employment). Lord Mackay also delivered the judgment of the Privy Council in the well-known case on negligence in *Dr Underwood S v Ong Ah Long* (1986) 4 PCC 613.

Lord Mackay retired as Lord Chancellor in 1997. He is currently Chancellor of Heriot-Watt University, and the present Editor-in-Chief of *Halsbury's Laws of England*.

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Lord Mackay of Clashfern
Lord Chancellor

Your Majesty, Vice Chancellor, distinguished guests, ladies and gentlemen, it is a great honour and privilege for me to have been invited to give this lecture, the Sultan Azlan Shah Law Lecture, which was founded in Your Majesty's honour, as a distinguished lawyer, and which Your Majesty has supported since its foundation.

This not only allows me to speak to you about a very topical subject in the United Kingdom but also to visit your beautiful country and to learn more about developments in the law in Malaysia. The fact that your senior judge bears the title of Lord President and that is the title by which the senior judge is known in Scotland, makes me feel very much at home here. I also know a little about Malaysian law and cases from the appeals that I heard as a member of the Privy Council. I joined the Privy Council after appeals from Malaysia had ceased to come to that forum, but there were some still to be heard and I came to know something of the Malaysian system in that way. I had the privilege of giving the judgment of the Board in some of these cases.

I have chosen as my subject this afternoon an area of law and court procedure which has raised many problematic issues in Great Britain. I know that there are many distinguished lawyers amongst the audience and I hope that what I have to say will prove of some interest to them. I hope that it will also prove of interest to those who may come from other fields. I have tried to make what I have to say stimulating for the former

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in the presence of His
Majesty Sultan Azlan
Shah.*

and at least intelligible for the latter. I have, however, assumed a fair degree of knowledge of the English legal system since I understand that many of you will be familiar with the way in which it operates.

I should emphasise that I shall speak only about the situation in Britain and my remarks relate to the situation there. A significant difference between our two systems is the fact that the evidence in these long trials in Britain is assessed by a jury. Some consider this a drawback in our system and I shall refer to that later. But I believe that what I have to say may have some relevance for your system as well since my lecture raises issues related to the conduct of these trials, the resources they should consume, how the time that they take can be limited, whether and how the judges should control the timetable without causing injustice, and what procedural avenues are possible to deal with these matters. These issues are necessarily important in any court process.

Long fraud trials

Long fraud trials were examined by the Committee on Fraud Trials, chaired by Lord Roskill, which reported in 1986, and by Parliament in the United Kingdom during the passage of the Criminal Justice Act 1987. In recent months, however, the problem of very long trials has received renewed attention. In this lecture, I shall look at ways of improving the conduct of the prosecution and defence, improving pre-trial procedures and increasing the powers of the judge to control the proceedings once the trial has started.

Some complex trials will inevitably be long but, in the interests of justice, no trial should last longer than is required to explore the issues and for a true verdict to be returned. As the trial continues, the strain on all participants (judge, jury, defendants, lawyers and witnesses) becomes greater—sometimes intolerably so—whilst the recollections of witnesses and jurors inevitably dim. Equally, the cost to the public purse is unjustified if a trial lasts longer than is necessary. It is arguable that many trials could be shortened; it is

also arguable that there should be a maximum time for a jury trial and that it should be fixed having regard to the factors that I have mentioned.

As many of you will know, in the light of concerns about a recent series of Court of Appeal decisions in which earlier convictions were set aside, a Royal Commission is currently studying the criminal justice system in England and Wales. It is due to report this summer. It is considering a number of matters of general importance. We look forward to its report with great interest. However, in these circumstances, it would not be right for me to speak about a number of options which are relevant but are more specifically under consideration by the Royal Commission or other bodies. These are such matters as the removal of many technical cases of fraud from the criminal justice system to allow them to be dealt with by, for example, professional or trade bodies; the creation of a general fraud offence; removing the right of jury trial in such cases; the creation of a formal system of plea bargaining; the replacement of committal proceedings; the use of information technology to present evidence in court; and perhaps most controversial of all, the abolition or restriction of the right of silence. I would say, however, in relation to jury trial that this was considered very carefully by the Roskill Committee, which formed persuasive arguments for removing juries from fraud trials and placing the assessment of the facts in hands of a specialist tribunal headed by a judge. This was not the point of view accepted by the Government nor by Parliament, so jury trial has remained for these cases.

First, may I give some background information. While the average length of contested Crown Court trials is falling, there are a growing number of individual trials which last for many months; some exceed years. With a number of further potentially lengthy cases likely to be tried soon, it is clear that, unless steps are taken, what would only very recently have been regarded as unacceptably long trials may become more commonplace. Not all long trials involve fraud. In 1991, of the 14 trials identified as lasting more than 200

court hours (approximately two months), only eight could be classed as fraud. Other cases included offences of sexual abuse of children, burglary and armed robbery. Clearly, there are factors which can lead to any criminal trial lasting a long time. It may involve complicated and lengthy investigation.

In addition, there is a perception that apart from the obvious “long” trials, many criminal trials take considerably longer than they should. This may, in part, be a result of the longest trials affecting the culture of the criminal trial generally so that some types of trial last longer than they need to, even though, as I have said, the average length of all trials around the country is getting just a little shorter.

Two examples

Some brief facts on recent trials may help. As examples I shall refer to *Guinness 1* and *Blue Arrow*. *Guinness 1*, more properly, *The Queen v Saunders and others*¹ was the first trial in which full use was made of the procedures under the Criminal Justice Act 1987. Saunders, the former Chairman and Chief Executive of Guinness, faced charges arising out of an alleged share support operation mounted by Guinness in its bitterly fought takeover battle with Argyll in the ultimately successful £2.7 billion bid for the drinks group Distillers. The trial took place between February and August 1990, and lasted 113 days. Numerous preparatory hearings took place between October 1989 and February 1990. There were 73 witnesses and ten days of speeches. Saunders himself gave evidence for over five weeks. The jury deliberated on an indictment with 20 counts for a total of 34 hours spread over six days. All four defendants were convicted and Saunders was sentenced to five years’ imprisonment, though this was later reduced by the Court of Appeal. The costs to legal aid were £1.3 million. Like a popular film, *Guinness 1* was followed by *Guinness 2*, *3* and *4*. *Blue Arrow* began in December 1990 and ended more than a year later in February 1992. It involved ten defendants (three companies and seven individuals). There were 123 witnesses and

¹
[1990] Crim LR 820.

611 statements running to 4,464 pages. The principal charge related to a conspiracy to defraud by the professional advisers to Blue Arrow PLC in relation to a share rights issue in 1987, at the time of the sharp fall in the London Stock Exchange. There were 15 counsels in all. Four of the defendants were legally aided; the total amount of these costs so far (the final bills have not yet been settled) is over £865,000. The remaining six defendants, since they were found not guilty, can claim costs from the State. These are estimated to be in the region of £16 million. Four defendants were found not guilty by order of the court, five not guilty by direction, one not guilty by the jury, and four were convicted but these convictions were quashed on appeal.

The increase in the number of lengthy fraud trials may be directly (but only in part) as a result of the creation of mechanisms which result in the prosecution of more of these offences. Accepting that these cases should continue to be tried, it is clear that trials lasting as long as a year, or even six months, are likely to impose an enormous burden on the system. The issues will become blurred in the minds of all participants and it must be questioned whether any participant will be able to recall the precise nature of evidence given many months before. As Lord Justice Mann said in the *Blue Arrow* appeal,² referring to the earlier trial,

The awesome time-scale of evidence, speeches and retirement and not least the two prolonged periods of absence by the jury (amounting to 126 days) could be regarded as combining to destroy a basic assumption. This assumption is that a jury determines guilt or innocence upon evidence which they are able as humans both to comprehend and remember, and upon which they have been addressed at a time when the parties can reasonably expect the speeches to make an impression upon the deliberation.

Allied to this is the physical and psychological strain that such trials place on all concerned. The defendant may well have been subject to investigation for some years prior to the trial. There is a danger that

²
R v Cohen and others
(1992) Unreported
(CA Crim). See *The Independent*, 29 July
1992; *The Times*,
9 October 1992.

the trial itself may be a punishment. Irrespective of whether jurors are capable of trying the cases, is it reasonable to expect them to suffer the personal inconvenience of doing so during such a period?

Costs of long trials

The costs of such proceedings are also a matter of widespread concern. The vast majority of criminal trials are publicly funded. Contributions to legal aid are negligible, and orders for costs infrequent. A trial day, excluding the costs against the defence of legal representatives and police witnesses etc, costs the taxpayer approximately £1,900. Each prosecution and defence counsel might typically be paid daily refreshers of between £250 and £500. A senior solicitor attending court might be paid £200 per day. These figures do not include the very substantial brief fees paid to counsel or the payments in respect of preparation paid to witnesses or the fees of expert witnesses. Moreover, some trials will involve use of information technology equipment to assist the presentation of evidence.

From these figures, we can see that a single trial day involving four defendants (two defence Queen's Counsels, four defence juniors and four senior solicitors, with one prosecution QC and junior counsel), without witnesses, travel expenses or information technology, might cost the taxpayer £5,500. Over a five-month trial that would total at least £550,000. I have already referred to the millions of pounds spent providing legal representation in *Guinness 1* and *Blue Arrow*.

Causes of long trials

What are the causes of long trials? Many long trials involve complex allegations of fraud occurring over a considerable period of time and involving a number of transactions. It is reasonable to expect that they will take longer than an average criminal trial where the issues are simpler. Nevertheless, it is necessary to consider more precisely

why they last as long as they do. Reasons seem to include the failure to identify key issues at an early stage; the absence of adequate procedural rules to assist the speedy resolution of issues; the absence of a general requirement of defence disclosure resulting in the ability of the defence to refuse, for whatever reason, to cooperate; the indictment being too long, too complex or unclear; lawyers who are verbose or take poor points, call inessential evidence or ask too many questions; the absence of judicial powers to control the course and manner of proceedings effectively.

The competence, style and methods of lawyers involved in a complex case determine to a large extent its length. It may not happen in this country but it is suggested in England that some of our lawyers do lengthen proceedings unnecessarily through unfamiliarity or

inefficiency. I make no judgment on that question.

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All manner of work, if done inadequately, may result in unnecessarily long trials—for example, the initial preparation of the case by both prosecution and defence solicitors, including advice given to clients about the chances of success and the options for pleas; the preparation of indictments

and case statements; the preparation of instructions to counsel; the initial preparatory work by counsel; the conduct of pre-trial reviews and preparatory hearings; and the conduct of the trial proper.

In addition, the late return of briefs, owing to listing or other difficulties, may well affect the ability of counsel to handle the subject matter of these complex trials. All these areas are matters of basic professional competencies and apply to both prosecution and defence.

I certainly believe that there may be scope to improve professional training for handling long trials generally and fraud trials

in particular. There are also skills which are particularly important for all long trials—identification of the key issues, making points succinctly and the inculcation of good practice generally. Even in very complex prosecutions there are usually some essential key points. It is also for consideration whether rights of audience or the grant of legal aid should be limited to practitioners who have satisfied their professional bodies as to their competence to handle these complex trials.

The prosecution

Let us consider the case of the prosecution. Obfuscation and lack of clarity can never benefit a prosecutor. Long trials will usually, but not inevitably, be those of very serious allegations and will call for the prosecuting authority to instruct the most experienced of counsel. Experience alone, however, may not necessarily provide the skills needed to limit a trial to the essentials that the prosecution requires to prove their case.

Both the Crown Prosecution Service and the Serious Fraud Office evaluate the performance of counsel involved in their cases. In the past, insufficient attention may have been paid to counsel's ability to prosecute a case effectively but succinctly. More attention is now being paid to this ability.

The prosecution bears the primary responsibility for deciding the eventual shape and length of a case. Decisions taken at the early stages of proceedings concerning which issues and which defendants are to be tried will inevitably influence the likely duration of the case and the response of the defence. Often, but by no means always, counsel will be involved in the early decision-making, but it is for the prosecuting authority which instructs counsel to ensure that cases are prepared in a manner reflecting the criteria set out in the Code for Crown Prosecutors.

The prosecution should always bear in mind that they are not conducting a free-ranging enquiry. They are laying before the court evidence to support the case in question, and by the time of the trial their case should be sufficiently defined.

When proceedings are under way, the prosecution must also play its part in controlling the progress of the case. Activity by the prosecution requires to be directed towards clearly defined objectives, with performance subject to regular monitoring and review. The prosecution should always bear in mind that they are not conducting a free-ranging enquiry. They are laying before the court evidence to support the case in question, and by the time of the trial their case should be sufficiently defined.

The defence

So far as the defence is concerned, it must be right to consider whether inadequacies in defence lawyers can be addressed without affecting a defendant's rights or the proper conduct of the trial. It has always to be borne in mind that the onus of proof is on the prosecution.

This can mean that there is very little incentive for the defence to be cooperative. Defence lawyers are employed to advise their clients and take their instructions on the conduct of their defence. Defendants may perceive that their chances of an acquittal would be strengthened by adopting delaying tactics and might put considerable pressure on their lawyers. In the last resort, these can include dismissing all or part of the team of lawyers, which will almost inevitably lengthen the trial. Against this background, it is understandable that, in protecting their client's interest, defence lawyers may not feel able to proceed as quickly as otherwise they might wish.

Orders made under section 19 of the Prosecution of Offences Act 1985 (commonly referred to as "unnecessary costs orders") are available when either party has incurred costs as a result of an unnecessary or improper act by the other party. The order is made against the defendant or the prosecuting authority. A new power has been introduced under section 19A to make what are called "wasted costs orders". These can be made against a legal representative as a result of an improper, unreasonable or negligent act or omission.

Comparatively few orders under either section have been made, and it may be that there is a reluctance to make a section 19 order against a defendant when it was really the fault of his legal representative. Section 19A is a comparatively recent introduction but it is not clear whether the power to make such order is yet being used appropriately and sufficiently. It has to be said, however, that in long cases so much depends on the circumstances of the case that it may be very difficult to use these powers effectively. They can, in any case, only be used after the costs have been incurred and therefore the damage has already been done.

Very few defendants in long trials are unrepresented. Cases in the past have had to be abandoned because the judge decided that the litigant in person was unable to continue his defence. The reasons why a litigant decides to represent himself may include lack of confidence in existing legal representatives, lack of funds, an unwillingness to take legal aid on the conditions prevailing or, at worst, a desire to wreck the trial. It cannot be right that a trial should be abandoned because the defendant refuses to be adequately represented.

I am aware of the difficulties that may be involved in obliging a defendant to accept a lawyer he has not chosen. Defendants do not, however, have an unfettered right to conduct their own defence in the manner they choose. Their evidence, and questions on their behalf, must satisfy the criteria of relevance and admissibility. Further restrictions are included in section 34A of the Criminal Justice Act 1988, inserted by the Criminal Justice Act 1991. A recent suggestion is that the court should have the power to appoint an *amicus curiae* to represent an unrepresented defendant. This power would exist where the defendant has been offered but has refused legal aid, and where in the opinion of the judge, the interests of justice require it.

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There are obvious difficulties about establishing the role of such an *amicus*, particularly since he might well have no instructions and therefore be unable to cross-examine witnesses.

It could however provide a helpful solution in some cases. It would be no solution in a trial where the defendant is bent on disrupting the proceedings. Indeed, in some cases, a trial might be lengthened by the presence of an *amicus* and there is a possibility of an increase in the number of appeals.

It is envisaged by those that suggest this that some contribution may need to be levied from the defendant to cover the costs of the *amicus*. Normally, if the defendant is acquitted, defence costs will come out of State funds. If found guilty, it is possible that the defendant may not have funds to make any contribution.

Possibly the trial judge should have the discretion to require the defendant to pay such contributions as are appropriate, taking into account all the circumstances.

Lawyers' remuneration

That leads me to the difficult subject of lawyers' remuneration—I say difficult because the rapid rise in the legal aid budget in England and Wales, which has now risen to more than £1 billion a year, has presented me, as the Minister responsible, with no end of difficulties. Under the present system, legal fees in these types of cases are paid after the trial is completed in the light of all the work done. Counsel is paid a brief fee, and amongst other amounts, refreshers to cover his daily appearances in the case. Solicitors are paid the costs of preparation and attendance. The prosecution endeavours to set fee parameters before the trial either by pre-making the brief fee or by agreeing an hourly rate payment for preparation plus the payment of refreshers to cover daily appearances. In some cases, however, prosecution fees are also negotiated *ex post facto*.

It may well be that a change in the way that the professions are remunerated for long cases could prove one of the means by which the length of trials could be reduced. I suppose it depends on your view of human nature. It has been suggested, for example, that if defence briefs were pre-marked (either inclusive or exclusive of refreshers), there would be considerable (but not improper) pressure on counsel and clients to ensure that cases are kept within the expected time estimates. Further, the process of fixing fees in advance would focus minds more precisely than at present on the expenditure of public money involved in pursuing a case in a particular way.

Improvements to pre-trial procedure

I should now like to consider improvements that might be made to the procedure before a trial commences. A trial on indictment starts with the empanelling of the jury, except in cases where a preparatory hearing is ordered (under section 7 of the Criminal Justice Act 1987) when the trial starts with the preparatory hearing. Quite apart from saving costs, there are very strong arguments in favour of limiting the length of the portion of the trial which takes place before the jury.

The judge is in control of the proceedings and has considerable powers to affect the conduct of a case. In long complex trials, he or she may be faced with difficulties in the following areas: the issues will be complicated and technical, and the ramifications of any rulings made early in the trial may not be immediately apparent; there will often be a large number of lawyers some of whom may have difficult clients and some of whom, as I said earlier, may have no particular interest in cooperating; the jury will be required to follow the case over a long period; the length of the trial might affect the ability of the judge to control it as rigorously as he or she would wish; and the judge's health may be adversely affected if the proceedings go on too long.

It is necessary to consider whether anything more can be done to help judges control the trial and its length. The following areas seem crucial: the initial choice of judge to try a case; the assistance

to judges who are likely to try these cases; and the powers of judges to limit the length of the trial.

In my view, it is essential that the trial judge be appointed at the earliest possible stage and that he or she conducts all pre-trial reviews and preparatory hearings. I am currently discussing the mechanisms to ensure that this takes place with the senior judiciary and the prosecuting authorities as part of my ongoing responsibility to monitor the overall allocation of judges. Judicial studies on the handling of long fraud trials presently comprise occasional seminars on accounting run by the Judicial Studies Board. There are currently no seminars specifically directed towards the handling of a long trial. I believe that it is important to ensure that judges have the right expertise in terms of knowledge of accounts, knowledge of banking and other financial practices, familiarity with information technology in courts and management of long trials. One way in which such expertise could be developed would be through seminars with judges experienced in conducting long trials. The development of these skills and the selection of judges whose strengths lie in this field cannot be too restrictive, however. I believe that it is important that the burden of these trials should be shared amongst a reasonably wide number of judges.

At present, it is open to the judge to request the prosecution to reduce the number of counts on an indictment where it appears to him that the indictment is overloaded. The judge has power to direct an amendment of counts which are expressed imprecisely or even quash counts which are found to be defective. Furthermore, he has power to order separate trials of any counts in an indictment, which in turn may lead to defendants being tried separately. As Lord Justice Mann said in the *Blue Arrow* appeal,

... the problem presented by the overloaded indictment can be solved only by a robust and early use of the judge's power of severance ... it is the only power available to limit (as opposed to identify) issues (as opposed to evidence) in order to secure a manageable and therefore fair trial. Judges must not be reluctant to exercise their power in order to secure that end.

I have to say, however, that I am concerned that the existing powers may not always be used sufficiently.

Preparatory hearings

Following the Roskill Report, a new regime was introduced for dealing with cases of serious and complex fraud. There is provision for a case to be transferred direct to the Crown Court so avoiding committal proceedings. Additionally, there is a system for a preparatory hearing to be held prior to the empanelment of the jury. The judge may order such a hearing on the application of any party or of his or her own motion and decisions made at such hearings are binding on the subsequent jury trial. Save with the consent of the judge, arguments cannot be reopened once they have been decided at the preparatory hearing. This is the main difference between preparatory hearings and pre-trial reviews, although the latter do have a useful function in enabling the judge to require the prosecution to reduce or clarify the indictment.

Preparatory hearings can only be ordered in serious fraud cases and even then only where the case is of “such seriousness and complexity that substantial benefits are likely to accrue”. The hearings can be used to identify the issues likely to be material to the verdict of the jury; settle legal points, including admissibility of evidence, prior to the trial, and require both the prosecution and defence to make statements of their case. The aim of the hearing is to isolate the issues in a case and settle as much legal argument as possible so as to reduce the time spent during the jury trial.

Preparatory hearings do have some disadvantages. Where case statements are produced by the defence, the judge has no power to order cross-service with other defendants without the agreement of the defendants. Also, the requirements which the judge can make of the defence to disclose its case, together with the sanctions for non-compliance, are frequently ineffective. Before considering whether the

procedure should be extended, it is necessary to consider how these problems can be addressed.

The purpose of ordering the defendants to state the nature of their defences is to help identify issues which are likely to be material to the verdict of the jury and to expedite the proceedings before the jury. In cases involving a number of defendants, there is no power to order one to disclose to the other.

The requirements that a judge can impose on the prosecution and the defence to state their cases (under sections 9(4)(a) and 9(5) of the Criminal Justice Act 1987) are different. The Crown's case statement must contain the principal facts of the prosecution case; the witnesses who will speak to those facts; any exhibits relevant to those facts; any proposition of law on which the prosecution proposes to rely, and the consequences in relation to any of the counts in the indictment that appear to the prosecution to flow from the matters stated in pursuance of the matters listed as I have just done. Failure to provide such a statement may result in a further order to make a statement, with the ultimate sanction being a finding of contempt. There is also a power for the judge, or any other party with the judge's leave, to comment on such a failure or on any departure from the case as set out in the case statement. The judge may also order the Crown to prepare their evidence and "other explanatory material" in a form to help the jury's comprehension and to give notice of any matter which the Crown thinks ought to be admitted.

By contrast the judge may require a defendant to give a statement in writing setting out in general terms the nature of his defence and indicating the principal matters on which he takes issue with the prosecution; notice of any objections that he has to the case statement; notice of any point of law (including a point as to the admissibility of evidence) which he wishes to take and any authority on which he intends to rely for that purpose, and a notice stating the extent to which he agrees with the prosecution as to matters which the

Crown say ought to be admitted and the reason for any disagreement (if the judge regards the reasons as inadequate he may require further or better reasons). The defendant, in complying, need not state who will give evidence, unless he would have to under the provisions relating to alibi or expert evidence which are generally applicable.

Practice in relation to prosecution case statements has varied. The Crown has an interest in explaining its case to the judge from an early stage and has generally done this through the statement of evidence (served with the transferred papers where the case is transferred) or through the case statement. In cases which are not transferred and where there is no preparatory hearing this is usually done through the provision of an opening note to the judge and the defendants.

There has been less variation over the content of defence case statements, which often seem to reflect a desire to disclose as little as possible. The language of the relevant section perhaps allows a defence case statement to be short and general. There is little incentive for the defendant to disclose his case where there is perceived to be a tactical advantage in delaying such disclosure until the last possible moment, and sometimes, such disclosure is never made at all. If two of the purposes behind ordering a preparatory hearing are to identify issues which are likely to be material to the verdict and to expedite the proceedings before the jury, then those can easily be frustrated by the lack of full disclosure and cooperation by the defendants.

There are only limited requirements, in English Law, which can be made of a defendant to disclose his case to the Crown. The principal provisions relate to alibis and expert evidence. I have referred to this already. Whilst the Royal Commission is considering the respective obligations of both prosecution and defence in criminal cases, the existing provisions relating to serious fraud and recent calls for there to be greater powers to order defendants to disclose their cases lead to an examination of this issue.

Disclosure of case by defendants

Inadequate defence disclosure is seen by many practitioners as the basic problem adding to the length of trials. The following problems are thought to lie with the present powers: the scope of what the judge can order may be too restricted; orders for disclosure are often inadequately complied with; the sanction against non-compliance or inadequate compliance rests only in the power of the judge to comment or permit comment and the jury being invited to draw an inference. A number of options exist if it is desirable to give the judge a power to order greater defence disclosure: the provision of a case statement with the same level of detail as that required of the prosecution; the provision of a “pleading” in defence to the prosecution’s case statement; or the provision of a line by line rebuttal of the case statement.

In tandem with these powers, new sanctions for inadequate disclosure or failure to disclose could be preclusion from cross-examination; preclusion from cross-examination or calling evidence relating to matters not disclosed in pre-trial disclosure; and financial penalties imposed on the defendant or his legal advisers.

Matters not relevant to juries

Matters which are not relevant to the jury should be settled, wherever possible, before jurors are empanelled. This principle applies to all classes of cases. Preparatory hearings, if the disadvantages referred to above can be reduced, are aimed at achieving these very objectives. One possibility would be to extend preparatory hearings beyond serious and complex fraud cases. The options for this extension appear to be: to extend them to all criminal cases; in all criminal cases subject to the judge being satisfied that the matter merits a preparatory hearing; in cases involving serious or complex fraud only; or in criminal cases estimated to last longer than a given time, say two weeks; or in criminal cases estimated to last longer than a given time if the judge is satisfied that the matter merits a preparatory hearing.

Whilst the reform of pre-trial procedures may ensure that there are fewer issues to take up time at the jury trial itself, it is necessary to consider the extent to which it is possible to reform the procedures within the jury trial itself in order to reduce its length.

The judge is of course master of the criminal trial, and it is his or her responsibility to ensure that it is conducted properly. A judge may ask questions of witnesses, and indeed, call or recall witnesses, assist unrepresented defendants and exclude evidence if it is inadmissible or irrelevant. The judge has an overriding duty to ensure that the trial is fair to both prosecution and defence. There is, however, no power to refuse to allow relevant evidence simply because it is repetitive or unnecessary. The adequacy of these powers to ensure a short but just trial has been questioned.

In his Child Lecture, Mr Justice Henry, who was the final judge in the *Guinness* trial, drew attention to Rule 403 of the American Federal Rules of Evidence. This states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The trial judge, while securing fairness, is required “to eliminate unjustifiable expense and delay to the end that the truth may be ascertained and the proceedings justly determined” in accordance with Rule 102. It is for consideration whether the trial judge in our system should have these powers.

Support for judges

As I said earlier, it has been noted that the length and complexity of the trial may place the judge under particular strain, and it may be that for these cases, particular support for the judge is needed. Several areas

suggest themselves: the assistance of a law clerk to provide advice and support; the assistance of an expert in accounting or other relevant areas; the provision of proper secretarial facilities to assist him; and the provision of information technology support. This assistance could relieve the judge of work that he himself would otherwise have to do. The need for such support would have to be discussed with the senior judiciary and the resource implications would certainly need to be examined very carefully.

Time limits

Given the necessary statutory powers, it would be possible for a judge to set time limits on the various parts of the criminal trial. “Time

limits” occasionally exist in practice in criminal cases where, for example, a judge is only available for a limited period and the case must necessarily finish within that period. However, time limits for various parts of a trial would be a radical departure from the present practice where the time taken is in effect determined by the parties and their legal advisers. There is a strong argument that

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it is not in the public interest that all trials should have as much time as the participants desire, without any real control. Obviously some provision would need to be made for the occurrence of unexpected events which lengthen proceedings.

There might be difficulties, particularly in trials with more than one defendant, where time allotted for a particular witness or argument had all been used by one or more counsel.

Similarly, the larger the trial the more difficult it is to estimate its length. However if judges and counsel are experienced, and longer trials, as I said, tend to attract more experienced lawyers, they should be capable of estimating how long parts of a particular case will last. For

time limits to be effective, the sanction for exceeding the time set aside, subject to the right of a judge to extend the period, would be that no more arguments or no more questions would be permitted.

An alternative to setting time limits for each stage of a trial would be to limit only selected parts. Essentially, these are areas in which it is especially reasonable to expect competent lawyers to put their points and arguments succinctly. It is suggested that such parts of the trial could be the preparatory hearing; opening and closing speeches by counsel, which could be supplemented by the provisions of written material to the jury; legal arguments, which could not reasonably have been anticipated before the opening speech. All of these could be subject to time limits.

Assistance to juries

In his Child Lecture, Mr Justice Henry suggested that the judge should have power to give greater assistance to the jury in understanding the case. He suggested that the judge should make the opening speech to the jury in which their respective roles would be outlined, the case of each defendant would be summarised and the jury would be given written directions on the law and a list of the issues; and the parties and the jury would be given a daily or weekly running summary of the evidence on each issue by the judge.

At present, the opening speech gives prosecuting counsel an unlimited opportunity to set out to the jury the prosecution's case. Sometimes opening speeches have been thought to be overly partisan and designed to make headlines for reporters. This may make the defence reluctant to state its case early on for fear that the prosecution may discredit its arguments.

There would appear to be substantial advantages in the case being opened by the judge in the way I have outlined. Fairness to both parties would ensue and the jury would have a much clearer understanding of the issues involved. The jury would be better placed

to evaluate the evidence and to assess it in the light of the known issues.

Full implementation of this proposal would require greater defence disclosure—and it may be that this is the best incentive to making disclosure. If the trial judge formed the opinion that the defence had not made proper and adequate disclosure, the extent to which he or she should comment on that is a matter of debate. Also open to question is the extent to which inferences could be drawn by the jury if there were departures from the case as disclosed or, where no positive case had been put forward, if some sort of positive case emerged later in the trial.

Instead of the judge opening the case, or in addition to it, case statements could be given to the jury. There are, however, a number of practical disadvantages. If a case statement was too long then it would be of little use to a jury who would be discouraged from reading or referring to it. If the case statements for prosecution and defence were arranged differently then it might become difficult to see how the same point was dealt with in the different statements (and this would be exacerbated if there was more than one defendant). It might be better for the jury to have a summary of the case statements or a list of key issues setting out the positions of the different parties.

Lord Justice Bridge, as he then was, in *Novac* said that:

In jury trial brevity and simplicity are the hand-maidens of justice.
Length and complexity its enemies ...³

Conclusion

I believe that long trials of the sort that have recently been seen are damaging to the whole fabric of the criminal justice system. They place an unacceptable strain on all parts of the system, not least on the judge, who has to ensure a fair trial and, more particularly, that the jury is placed in the position of not being able to give a true verdict. I

³
R v Novac (1977) 65 Cr
App R 107 at 118–119.

accept that, with the increasingly complex nature of fraud trials, issues of great complexity will need to be tried and that this will, necessarily, take time. Not all of those issues, however, are suitable for a jury to decide, and I believe that it is important that as much as possible should be settled before the trial begins so that it can be completed as expeditiously and efficiently as possible. The primary aim of this approach is to achieve that end and to save time on unnecessary argument and surprise at other stages by increasing the power of the judge to control the progress of the trial.

The matters to which I have referred are all the subject of current debate in Britain. As I read in *The Times* on my journey to Kuala Lumpur, the outgoing Commander of the Metropolitan Police Fraud Squad has suggested specialist, properly trained, judges and barristers for cases involving complex fraud. He has emphasised the need for proper management of these cases, something I have also emphasised in my lecture this evening.

I hope that the issues that I have raised in my talk this evening have proved interesting and of relevance, notwithstanding the absence of juries in your system. As I said at the beginning, the question of controlling long trials whilst ensuring fairness is of relevance to the court process generally. Although you have no juries in these cases and therefore what I have said about the effect of long trials on jurors does not apply here, most of the other considerations do apply. The determination of the verdict in your system rests with the judge. Lord Justice Mann said that jurors are only human and naturally have certain limits. But this also applies to judges. There are limits to the capacity for absorbing, mastering and therefore properly weighing the issues of fact that may be raised. If the length of the cases goes beyond these limits, then injustice is likely to result. These limits vary from judge to judge, and no doubt for long trials judges should

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be chosen for whom the limits are most generous. This may itself not always be easy to determine. I am sure that as you in Malaysia face up to these problems and deal with them, your decision may be helpful to us in Britain in coping with them.

I should like to end by referring to a subject which has little to do with long trials, though it is a matter close to the hearts, or rather heads, of some practitioners involved in them. I refer to the wearing of wigs. Some of you may have seen reports that they are not to be abandoned after all in British courts. Well, speculation is a fine tradition in the British press. The fact of the matter is that the Lord Chief Justice and I have issued a consultation paper on court dress and my officials are assessing the response. No decisions have yet been made but it does seem that those who responded to the consultation exercise, not least the members of the public, are to a large extent favouring the retention of some aspects of current court dress. Change comes slowly in the law, some people say, and we shall have to see whether, quite apart from the possible changes I have outlined in the main part of my lecture, the British system is ready for all the changes, including the abandonment of wigs, that I have referred to this evening.

I began by saying what an honour and privilege it is to be invited to give this lecture. Although the Malaysian system is not now linked to the British system by any formal mechanism for appeals, I think that it is very important for both our systems that we should each take an interest in, and learn from developments in, the other. I know that Your Majesty has taken a deep interest in the progress of the legal system in the United Kingdom and it has been my privilege also to be deeply interested in developments in Malaysia. I am profoundly convinced that the Rule of Law administered by a strong, wise and independent judiciary is fundamental to the health of a society. I would like to express my good wishes to Your Majesty and to the Government and people of Malaysia. 🍀