Submission of the Hong Kong Bar Association

DRAFT PRACTICE DIRECTION
FOR COMPLEX COMMERCIAL CRIME TRIALS

Introduction

1. The Hong Kong Bar Association ('HKBA') having reviewed the contents of the proposals in committee (the Special Committee on Criminal Law & Procedure "SCCL") support the desire of the Judiciary to expedite the hearing of complex commercial crime trials in the High Court and the District Court.

2. The following comments on the draft Practice Direction ("PD") are provided in response to Mr. Justice McMahon's request for views, (see letter of the 14 August 2009) from the HKBA.

Comments on the draft PD

3. Procedure – Paragraph 4 (and 9(a))

3.1 Paragraph 4(b) of the current draft should be read together with and subject to the expressed desirability of counsel who would appear for the parties at trial (paragraph 8(c)) to be present at the case management hearing.

3.2 The requirement to have trial counsel present (paragraph 8(c)), may be difficult to achieve if the initial case management hearing is to be set down within one month of the case coming before the Listing Judge as proposed by paragraph 4(b).

3.3 Per paragraph 4 (c) wherein it is envisaged that the prosecution may be ordered by the Listing Judge to prepare the following:

- A summary of the facts in respect of each charged offence
- A summary of the role of each defendant in respect of any charged offence
- A list of prosecution witnesses with a brief description of the evidence of each witness &
- The relationship of each witnesses evidence to the prosecution case
- An exhibit list with sufficient of the exhibits to allow the Judge to know the general nature and approximate quantity of exhibits to be produced by the prosecution

before the initial case management hearing, it is our view that the prosecution will have

insufficient time to meet these requirements.

3.4 In order to meet the requirements of an order under paragraph 4(c) of the PD in a complex commercial crime the prosecuting trial counsel would have to be out of court for a considerable period of time prior to the initial case management hearing; something which is not capable of being planned (given that the orders are made by the listing Judge) nor practical for criminal practitioners practicing at this level, nor financially viable under the current standard Department of Justice remuneration rates which are:

	High Court	District Court
Brief	$14,000	$9,000
Refresher	$7,000	$4,500
Mention fee	c.$1,150	c.$1,150
Conference fee	c.$880 ph	c.$880 ph
PTR	c.$1,720	c.$1,720

3.5 There are concerns that Pre-Trial Review ("PTR") judges in the District Court are often not the assigned trial judge or do not know if they are the assigned trial judge, and counsel appearing at the PTR may not ultimately be the trial counsel involved because the assigned trial counsel is detained in another court conducting another trial and has not been released for the case management hearing / PTR. The release of counsel during trial for the purpose of attendance upon other courts for pre trial matters being at the discretion of trial judges and our experience indicates is a discretion not exercised in a manner that is uniform.

3.6 In respect of paragraph 9(a) wherein the designated trial Judge may "at any time" order the prosecution to provide:

- An expanded summary of facts or
- A written opening together with exhibits
- Particulars of the prosecution case against each accused in respect of each charge or count

We express similar concerns to those above at 3.4 – time, availability, release from other commitments, remuneration.

4. <u>Expert evidence</u>

4.1 An express provision could be made as to the intended use & service of expert reports.

4.2 It is suggested that proper notice be given of the areas in which the experts are required to give evidence; with a declaration by counsel that the report will be served in good time.

4.3 Similar requirements can be found in civil cases regarding expert evidence (paragraph 20 of Practice Direction 5.2). In case management for civil trials, the Court will not give permission to adduce expert evidence unless the party has:

(a) identified the expert by name and field;
(b) identified the issue to which the expert evidence will relate; and
(c) considered the appropriateness of appointing a single joint expert in the case.

4.4 It is suggested that the prosecution disclose materials when there is a possibility that the independence of an expert to be called by them may be compromised.

4.5 The PD could provide an opportunity for experts to meet, discuss and define for the Court what the issues are.

5. Disclosure

5.1 We raise the question as to whether the time has come for the prosecuting counsel to declare that (s)he is personally satisfied that all proper disclosures have been made. Ought the prosecutor be asked to personally ensure that disclosure has been made.

5.2 Where the claim to Public Interest Immunity ("PII") or Legal Professional Privilege ("LPP") is made, it should be listed and privilege claimed.

6. Efficient Case Management

6.1 Since the objective of the PD is to encourage active case management in complex commercial crime cases, it may assist the Court if the prosecution could indicate the country in which the witnesses resided when they filed a list of prosecution witnesses.

6.2 If witnesses do not reside in Hong Kong, the prosecutor should be required to give assurances that overseas witnesses will or will not be attending, and state the basis of that assurance. The possibility of mutual legal assistance or letters of request issues should also be explored as it may affect the length of the trial.

6.3 It is, however, noted that when counsel is acting for prosecution, such an assurance will only be an opinion dependent on what he/she is informed by the Officer-in-Charge of the case.

7. Drafting Admitted Facts - Paragraph 9 (b)

Introduction

7.1 It has been the combined experience of those prosecuting counsel who have contributed to these comments that a great deal of wasted (and unremunerated) time energy and effort is expended on drafting and continually re-drafting admitted facts which are either not used or so emaciated as to be useless.

7.2 Further it is the experience of those prosecuting counsel who have practiced in other common law jurisdictions (including England & Wales and Australia) that the recourse to admitted facts such as we experience in Hong Kong's courts is unique; and that much greater use of the legislative equivalents of our s.65B Cap 221 (that is the production of &/or reading in entire statements) is the norm in these other jurisdictions and is an approach that ultimately proves to be a more efficient method of conducting trials, notwithstanding the superficial attractiveness of 'admitted facts' as they are currently deployed.

7.3 Further, greater use of s.65B Cap 221 as opposed to the current 'over use' of s.65C (admitted facts), would – we suggest – reduce the risk that a prosecutor may overlook the inclusion of some apparently trivial but ultimately important piece of evidence when drafting admitted facts.

Comments on the proposed PD – paragraph 9(b).

7.4 In respect of paragraph 9(b) members expressed the view that defence counsel would have difficulty meeting this requirement (that is an explanation of a refusal to admit a fact) in the absence of full and proper disclosure by the prosecution. Experience shows that late disclosure is not uncommon.

7.5 Further and more fundamental is the issue of a defendant's right to silence. Paragraph 9(b) of the draft PD is seen as an encroachment upon the right to silence.

7.6 Members are concerned that paragraph 9(b) as it stands enables a prosecuting counsel to draft admitted facts amounting to their entire case – including reference to material the admissibility of which is or may be disputed – and then with the assistance of the designated case management judge (who should be the assigned trial judge) embarking on an exercise wherein the defence have to justify / explain point by point why each matter/issue should not be admitted. Such a scenario fundamentally alters the current approach to trials. It would have the effect of:

- Forcing an accused to disclose his entire defence
- Involving the Judge in the 'drafting' or 'editing' of admitted facts

7.7 We do not feel it is appropriate or desirable in the interests of justice for the judge to be seen to be involved in the drafting or editing of admitted facts and looking at

different versions of admitted facts when he will (or may) ultimately be the arbiter of facts in his capacity as trial judge.

7.8 In any event, if the defence unnecessarily prolongs the trial by refusing to make sensible admissions, they face the risks of a costs order at the end of the trial. The time to assess the reasonableness of the defence's refusal to admit facts is when all the evidence is produced and issues are crystallized at the end of the trial.

Conclusion

8. We applaud the desire of the Judiciary to have efficient case management and we support it.

9. It is beyond the scope of the PD we have been asked to comment upon, but it is the view of those contributing to these comments that the length of trials would be reduced by the introduction of some form of jury for trials in the District Court; so doing would force both defence and prosecution counsel to be more focused and efficient in their conduct of trials (to avoid 'losing' the jury) and obviate the need for lengthy verdicts – which often, not surprisingly, take District Court Judges many weeks to write.

Hong Kong Bar Association

Dated: 16 October 2009