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Mr Max Hill QC
Chairman
Criminal Bar Association

18 April 2012

Dear Mr Hill

Consultation on VHCC Sub-group Proposals

As you may be aware, following a request from the CJS Operation Board in December 2010, I set up and chaired the VHCC Sub-group. The Sub-group's remit was to address the disproportionate amount of court time, legal aid and prosecutor and investigator resource consumed by VHCCs.

The following bodies were represented on the Sub-group: CPS; AGO; Home Office; Ministry of Justice; HMCTS; LSC; the Law Society; the Bar; SFO; SOCA; HMRC; City of London Police; and the Office of the Lord Chief Justice.

The Sub-group met on nine occasions between January 2011 and January 2012, and it has put forward the following proposals:

i. To publish a Guide to Best Practice in VHCCs, for use by practitioners, including the judiciary. The Guide is enclosed with this letter.
ii. To write to the Lord Chief Justice to suggest specific revisions to the Heavy Fraud Protocol; and
iii. To monitor practitioner compliance with the VHCC Guide by assessing a few finalised cases, by reference to defined performance metrics.

I am writing to you invite your comments on each of these proposals, which are outlined in more detail below. In addition to Sub-group members, we are also consulting with: the CJS Crime and Criminal Justice Strategy Board; GLS Prosecutors; the Criminal Bar Association; and the Financial Services Authority.

VHCC Guide

The enclosed VHCC Guide sets out the best practice articulated by the Sub-group. The Guide identifies 16 core actions, which should be applied in every VHCC. The core actions reflect both areas of practice which are relatively

new, such as the use of particular documents by the prosecutor, and established practice, considered essential, such as oversight by case management panels.

We propose that the Guide is published on the CPS internal intranet and on its website; on the GLS LION website; and that a PDF is created, for distribution to members of the Sub-group, and any other interested parties, such as the FSA and the Criminal Bar Association. Each party would then decide how to publish it for its own members.

The Sub-group representative from the Office of the Lord Chief Justice has suggested that the Senior Presiding Judge may wish to endorse the Guide when it is published.

Heavy fraud protocol
At the suggestion of the Sub-group's representative of the Office of the LCJ, the Sub-group agreed to propose a number of revisions to the "control and management of heavy fraud and other complex criminal cases", a protocol issued by the Lord Chief Justice of England and Wales in 2005. The proposed revisions are at **annex A**, and a copy of the protocol is enclosed with this letter. The Lord Chief Justice is aware of this proposal, and we intend to write to him with these suggestions following the consultation.

Monitoring compliance with best practice
The Sub-group agreed that it should meet at a future date, to review compliance with the VHCC Guide, by reference to assessments of a few finalised cases. It is recognised that we would need to review cases that are finalised, so we anticipate that the review would not take place for at least 18 months after publication of the Guide.

It is proposed that the assessments are carried out by an existing case management panel, from the CPS or SFO, which was not involved in the cases in question. The panel would assess compliance with the Guide by reference to a list of performance metrics (**annex B**), based on the Guide's core actions. Each metric may be assessed by whether it has been fully met, partially met or not met.

We anticipate that the panel may wish to hold meetings with the prosecution case team, the defence, the trial judge, and also with the investigation and prosecution case management panels that had responsibility for the case.

The VHCC Sub-group would then meet to discuss the panel's assessment of these cases, and make recommendations to the Board, where necessary.

I would be grateful if you could send any comments you have in respect of these three proposals by 31 May 2012 to: John Edwards, Secretary to the VHCC Sub-group: johnr.edwards@cps.gsi.gov.uk; Tel: 020 3357 0846.

Yours sincerely

Peter Lewis

Peter Lewis
Chief Executive, CPS
Chair of the VHCC Sub-group

GUIDE TO BEST PRACTICE IN VERY HIGH COST CASES

A Guide issued by the Very High Cost Cases (VHCC) Sub-group, which was set up by the CJS Operational Board in December 2010.

Introduction

The VHCC Sub-group was created to address the disproportionate amount of court time, legal aid and prosecutor and investigator resource consumed by VHCCs.

The Sub-group met on nine occasions between January 2011 and January 2012. Its main aim of was to identify best practice in VHCCs. This Guide sets out the best practice articulated by the Sub-group.

Definition of a VHCC case

The best practice applies to a broad range of cases, not simply those that the Legal Services Commission (LSC) or a particular prosecution agency may define as a VHCC. For the purposes of this Guide, a VHCC case is a long and complex or serious case.

Objective of VHCC litigation

The Sub-group defined the objective of VHCC litigation as the fair, efficient and effective prosecution of very complex cases through focussed and time and cost effective litigation.

Principles of a VHCC litigation regime

The Sub-group identified eight principles that form the basis of best practice in VHCCs. These principles guided the work of the Sub-group, providing the starting point for its discussions. Each section of this Guide is structured around one of these principles.

Core actions

The best practice can be distilled into 16 core actions, which should be applied in every VHCC. The core actions reflect both areas of practice which are relatively new, such as the use of particular documents by the prosecutor, and established practice, considered essential, such as oversight by case management panels.

The core actions are:

- Case management panels will meet regularly to actively supervise the investigation and prosecution of VHCCs.
- There will be a document setting out the investigation strategy.
- There will be a document setting out the prosecution strategy.
- The selection of charges will ensure cases are as small and focussed as possible.

- Prosecutors will consider initiating plea discussions in every VHCC involving a serious or complex fraud.
- Prosecutors will consider the use of a disclosure management document.
- Prosecutors will record all disclosure decisions and actions in a disclosure log.
- The AG's Guidelines on the Disclosure of Digitally Stored Material should be applied by prosecutors and investigators in all appropriate cases.
- Prosecutors will consider serving a prosecution case statement.
- Abuse of process arguments will usually be conducted by written submissions only.
- There will be routine use of digital working or EPPE in VHCCs.
- Live video links to prisons, police stations and witnesses will be used where appropriate.
- VHCCs will usually involve a financial investigation, restraint and confiscation proceedings.
- VHCC prosecutors will use a knowledge information management (KIM) site to share best practice.
- Advanced litigation mentors should assist prosecutors to manage VHCC litigation.
- Post-case reviews will be held by investigators and prosecutors in all VHCCs.

Principle 1
Each VHCC will be treated as a major litigation project and planned, directed, supervised and financially controlled accordingly. There should be complete visibility and transparency of the management of these cases.

Core actions
- **Case management panels will meet regularly to actively supervise the investigation and prosecution of VHCCs.**
- **There will be a document setting out the investigation strategy.**
- **There will be a document setting out the prosecution strategy.**
- **The selection of charges will ensure cases are as small and focussed as possible.**

Investigation & prosecution case management panels
Given the huge resources involved in VHCCs, it is proper that they should be subject to a degree of scrutiny and control, at a senior level, which is proportionate to their cost to the CJS. Such supervision should reduce the time and money spent on these cases and ensure that parties to the litigation are accountable for their decisions.

Case management panels should carry out this supervisory role in both investigation and prosecution agencies. The purpose of these panels is to ensure that robust strategies are in place for the effective investigation, preparation and presentation of cases.

The panels should also ensure that all expenditure on VHCC cases is necessary and proportionate. Checks on expenditure should be built into all stages of the investigation and litigation process, with senior officials responsible for approval of larger expenditure.

Case management panels should preferably meet regularly (every 4-12 weeks), and the issues they address may include the following:

- Possible discontinuance of investigations.
- A clear strategy for the investigation / prosecution.
- The budget allocated to the case is effectively managed, both in terms of whether an investigation/prosecution provides value for money, and approval of individual items of expenditure.
- Resources and skills are used appropriately and at the right time.
- Victim and witness strategies are in place.
- Charges selection and drafting.
- Anticipation of defence case and tactics.
- Advocate selection and fees, including the monitoring of decisions by reviewing lawyers.
- Monitoring of case auditors' work in managing the case budget.
- Deployment of tasks and responsibilities across the prosecution team of external advocates, in-house prosecutors, caseworkers and investigators.
- Disclosure issues.
- Case progression, including a Red Amber Green (RAG) assessment.
- Performance improvement, where necessary.
- Monitoring of deadlines and case milestones.

Tasking and coordination

Since the decision to investigate/prosecute is likely to lead to a greater consumption of resources than alternative disposals, it is important to choose only appropriate cases for investigation/prosecution. Tasking and coordination (T&C) work is the first stage in this process.

Although the prosecutor should be involved in cases at an early stage, in principle there is no requirement for the prosecutor to play a part in the T&C process. Prosecution involvement will usually begin once a case is selected for criminal investigation, and the investigation strategy is being developed.

Investigation strategy document

The early shape and direction given to a case immediately after its adoption for criminal investigation is critical in determining its final outcome. This will include the impact that the disclosure process may have on the case.

The purpose of an investigation strategy is to provide a standard planning and review process for all cases from adoption to closure. The strategy should ensure a consistent and disciplined approach throughout the life of the case, no matter how long, and regardless of any change of personnel in the investigation or prosecution team. Reviews of the strategy should take place regularly.

Key components of an investigative strategy:

- The strategy should where appropriate take account of and be informed by any relevant national, international or overarching strategy or guidance. For example, strategies relating to fraud, counter-terrorism or organised crime.
- The Investigators' Convention may apply where there are linked or overlapping investigations by another investigation agency. An agreement should be reached on which agency takes the lead in particular areas of the investigation, and on liaison between the agencies.
- There should be prosecution involvement in the investigation strategy at the earliest possible stage.
- A calculation of revenue / financial loss that will be recovered / prevented.
- Identification of key risks and steps taken to mitigate risks. The tasking and coordination team should be alerted to all risks.
- Operational strategy or objectives: what are the aims, targets and scope of the operation?
- Tactical plans: how will the objectives be achieved? What is the most effective approach: prosecution, civil recovery, disruption, taxation, stopping repayments, SCPOs, or a combination of these?
- Disruption plan: possibilities and tactics, and the preferred option.
- Investigation plan: how is the evidence to be gathered? Is corroborative evidence really required, such as forensics or communication data? Consider the use of human intelligence and specialist teams, such as surveillance and financial investigation.
- Are international enquiries achievable, bearing in mind potential delays and translation costs?
- Where there are linked investigations in other jurisdictions, the responsibilities of each investigation team should be agreed and, where appropriate, consideration should be given to the formation of a Joint Investigation Team, with assistance from Eurojust.
- Suspect strategy: are SOCPA or witness protection measures appropriate?
- Arrest, search and interview strategy: what are the reasons for arresting / not arresting? What is the interview strategy? Do the search objectives and parameters ensure that premises and property are targeted with sufficient precision? Can digital material be selectively extracted and imaged, rather than seizing the hard drive or other media?
- Prosecution plan: how will the material gathered be turned into evidence? What are the sensitive issues in the case? What ancillary orders can be sought?
- Disclosure plan: what material is relevant to the investigation, including third party and LPP material? Particular problems may be encountered where a corporate has already conducted an internal investigation, which generates large volumes of material potentially subject to LPP. Review linked cases. Allocate any special roles within the disclosure process.
- Linked internal operations: large investigations may be linked to several other operations, or come under an umbrella operation.
- Liaison with other agencies: establish the parameters of relevant material in the hands of other agencies, and agree on disclosure obligations.
- Parallel litigation: where there is parallel litigation, such as civil proceedings, agree with the other litigator on issues such as parameters

and timing of proceedings, whether any proceedings should be stayed or adjourned, and cross-disclosure. Does the parallel litigation affect the choice of tactics/disposal for the case?
- Restraint and confiscation plan: the financial strategy may be prepared separately but should be referenced in the investigation strategy.
- Media strategy: What authority level for media disclosure has been agreed?
- De-briefing and aftercare plan: identification of good practice and information that could inform future strategic decision making. See principle 9, post case reviews.

The processes by which the strategy is implemented may include the following:
- Target dates for completion of tasks and key milestones.
- Operation of a Red, Amber, Green (RAG) scoring system, to identify cases that are not progressing well, and steps to be taken for improvement.

Prosecution strategy document
To ensure VHCCs are properly planned a prosecution strategy document (PSD) should be drawn up in every case. (The CPS is to mandate the use of a PSD in all VHCCs.)

The strategy should establish a disciplined approach to the case, and foster a close working relationship with the investigator, from a very early stage. Appropriate cross-referencing to the investigation document is encouraged.

Prosecution counsel should be involved in the prosecution strategy at an early stage, so that counsel assists in its formulation, and fully understands the relationship between the strategy, the selection of charges and the presentation of the case in court.

The written strategy should provide a cradle to grave approach to prosecuting a VHCC: it requires a prosecutor to give thought to the issues in a case at an early stage, and it should prevent a case from unnecessarily growing in size.

The strategy should where appropriate take account of the Prosecutors' Convention, which sets out prosecutors' responsibilities where a suspect's conduct could be dealt with by criminal or civil/regulatory sanctions, and where more than one prosecuting authority has power to take some action.

The strategy should be subject to regular review.

The following is a list of key issues that may be addressed in a PSD. Any actions or decisions should be set out, with reasons.
- Overall objectives of the investigation / prosecution.
- Identification of the key suspects and parties who are not to be included in the investigation. The period of offending to be investigated is critical for the overall management of the case, and in particular the unused material in

the case. Where an investigation is to target a shorter timeframe than the period over which the offending took place, this should be stated.

- Plan for dealing with the alleged criminality. Investigators and prosecutors should agree on the most efficient and effective way to deal with the criminality, whether by way of a criminal prosecution or another disposal. Consideration should be given to the Attorney General Guidelines on the use of civil recovery powers.
- Specific evidential lines to be pursued:
  - ❖ Lines of enquiry should be focussed, and identified as early as possible. Provision may need to be made for voluminous material, so that disclosure obligations are complied with, in reasonable timescales.
  - ❖ It should be made clear where an enquiry is made to pursue material that may undermine the prosecution case or assist the defence.
  - ❖ Decisions not to pursue a line of enquiry on the basis that it is not considered reasonable to do so should be recorded.
  - ❖ The following lines of enquiry may have a significant impact on the disclosure material in a case. Careful consideration should therefore be given to the necessity and scope of these enquiries:
    - o Search warrants: much investigator resource is spent on drafting informations and obtaining warrants, which are sometimes the subject of Judicial Review. Prosecutors may advise on the drafting.
    - o Disclosure Notices under s2 CJA 1988 (SFO power), or s62 SOCPA 2005 (police / SOCA power).
    - o Letters of Request seeking evidence from other jurisdictions: the late execution of requests can disrupt proceedings.
- Agreed interview plan. Where possible, prosecutors should discuss interviews with investigators, to focus them on the criminality and timeframe under investigation. Under paragraph 1(ii) of the protocol on the control and management of heavy fraud and other complex criminal cases, March 2005 (heavy fraud protocol), interviews should be properly planned, with key documents served beforehand, or available during interview.
- Asset preservation and recovery:
  - ❖ The PSD should address the early identification and restraint of assets, with a view to minimising the risk of dissipation: see principle 8.
  - ❖ The Disclosure Officer, or a financial investigator, must provide schedules of the financial material to the prosecutor.
  - ❖ Consideration will need to be given to the treatment of restraint material obtained by compulsion, particularly where the permission of a Judge may be required to disclose the material to a co-defendant.
- Disclosure and management of unused material. The PSD need not focus on all aspects of the disclosure process but key issues should be noted:
  - ❖ Details of the Disclosure Officer, and the applicable disclosure regime (pre CPIA; CPIA pre CJA 2003; or CPIA post CJA 2003).
  - ❖ Is the DO properly trained, does he have sufficient knowledge of the issues in the case, and is he available throughout the lifetime of a case? If not, the prosecutor should discuss with the senior investigation officer.
  - ❖ Disclosure counsel will often be required on VHCCs. Counsel should be instructed at an early stage, and instructions should clarify counsel's role and decisions that can be taken without referral to the prosecutor.

- ❖ What material gave rise to the investigation, and are there disclosure issues relating to the start of the investigation, or a linked investigation?
  - ❖ Appropriate parameters for relevant unused material can be drawn up, to assist the Disclosure Officer. These should be kept under review.
  - ❖ Arrangements to inspect material in the possession of other departments within the investigative authority, and third parties.
  - ❖ Provisions for searches of digital material: see principle 3.
- Ancillary orders. Available orders are set out in the CPS Ancillary Orders Toolkit. Prosecutors should consider orders to be requested, so that relevant material is served prior to conviction, and any related unused material is scheduled.
- Risk and resources. Allocation of resources should be considered at an early stage, and kept under review. Risks include the sensitive material presenting a risk to a successful prosecution.
- Key milestones. Anticipated dates of key milestones should be recorded.

The selection of charges

The selection of charges should be consistent with the objectives of the case as articulated in the prosecution strategy.

The decision as to who to charge with what offence is an important decision in shaping the future size of the case. Where there are multiple suspects, against whom there is sufficient evidence to charge, prosecutors should give very careful consideration as to who in fact to prosecute.

Although charges need to reflect the criminality of defendants, this can be done whilst reducing the size of cases. The following points may assist when making charging decisions:

- There should be a limited number of defendants in each trial: no more than 4-6 defendants if possible, although this may not be realistic in some cases, such as large terrorist conspiracies.
- The focus should be on the principals. Careful consideration should be given to suspects who might be peripheral to the main suspects. Depending on the circumstances, such suspects may be treated as potential prosecution witnesses (disclosure of their role would be required).
- *R v Shane Matthews* [2010] EWCA Crim 3202 lends support to the prosecutor's right to chose who to prosecute and, by implication, who not to prosecute: "It is no defence to say that others in similar shoes to the appellant have not been prosecuted, and it is of no significance whatever" (paragraph 26).
- Where it is difficult to reduce the number of defendants, a series of trials may be appropriate. It may better to wait until the trial management stage to "chop up" cases, when defence statements have been served.
- Juries may understand trials better where separate trials reflect the hierarchies within criminal networks.
- One advantage of a series of trials is that where defendants plead in one trial it may have a domino effect on defendants' pleas in subsequent trials.

- A series of trials is the best way to manage large cases, even though it may sometimes increase the overall length of proceedings, and each trial produces material to be considered for disclosure in subsequent trials.
- Trial length can be reduced by charging offending that relates to a limited time period, which may involve less use of all encompassing charges, such as "Cheat".
- An indictment can be used to focus a trial on clear, narrow issues: for instance, the particulars of a Conspiracy count may list specific allegations.
- Due to limited resources, investigations will be narrower in scope than in the past. The aim will be to achieve a result, as opposed to the best result.
- Sometimes the selection of charges against a particular defendant needs to be seen in the context of other methods of addressing the defendant's overall criminality. For example, HMRC is primarily concerned with revenue collection, and may wish to use taxation or other disposals to deal with some aspects of offending. This may need to be explained to a judge.

Principle 2
Plea Agreements should become a common feature of VHCC litigation.

Core action

- **Prosecutors will consider initiating plea discussions in every VHCC involving a serious or complex fraud.**

The Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud (the Guidelines) have been in force since 5th May 2009. However, to date, only a small number of plea agreements under the Guidelines have been concluded.

The Guidelines set out a process by which a prosecutor may discuss an allegation of serious or complex fraud with a person who he or she is prosecuting or expects to prosecute, or with that person's legal representative.

The purpose of the discussions is to narrow the issues in the case, to reach an agreement on acceptable pleas of guilty, and to prepare a joint submission as to sentence.

Given these potential benefits, prosecutors should consider whether to initiate plea discussions in all VHCCs that comprise an allegation of serious or complex fraud. Where a decision is made not to initiate plea discussions with a particular defendant or suspect, a record should be made of the decision, with reasons.

Principle 3
The prosecution and defence will discharge their disclosure obligations, and disclosure proceedings will be conducted, in accordance with disclosure law.

Core actions

- **Prosecutors will consider the use of a Disclosure Management Document.**
- **Prosecutors will record all disclosure decisions and actions in a Disclosure Log.**
- **The AG's Guidelines on the Disclosure of Digitally Stored Material should be applied by prosecutors and investigators in all appropriate cases.**

Consolidated guidance on disclosure

It is anticipated that a consolidated guidance on disclosure will be produced in the near future, in accordance with recommendation 18 of the Gross Review. Once that guidance is published, this section of the Guide will be amended so that it simply refers and links to the new consolidated guidance.

Prosecution led improvements

The Gross LJ Review of Disclosure in Criminal Proceedings, September 2011 (the Gross Review), makes recommendations for investigators, prosecutors, the defence and the judiciary in cases generating a substantial amount of documentation.

The Review was published during the Sub-group's work programme. The Sub-group had a preview of the Review, and many of the recommendations in the Review are reflected in the best practice in this Guide.

The key to best practice is a cradle to grave focus on disclosure, as recognised by Gross LJ: "it is essential that the prosecution takes a grip on the case and its disclosure requirements from the very outset of the investigation" (paragraph 8.vii).

A cradle to grave approach means that disclosure practice is not confined to simply the discharge of CPIA disclosure obligations, such as the timely service of initial disclosure or the correct approach to reviewing digital material, but instead forms an integral part of all aspects of case preparation: see principle 1.

Gross LJ advises that improvements in the disclosure process must be prosecution led (paragraph 8.vii). This section of the Guide highlights ways in which this may be done.

Disclosure management document

Prosecutors should consider drafting and serving upon the court and the defence a disclosure management document (DMD). (The CPS is to mandate the use of a DMD in all VHCCs.) The document should set out the position that the prosecution takes in dealing with unused material.

The DMD should enable prosecutors to take a pro-active approach to disclosure from the outset of proceedings, and make the disclosure process transparent.

There are several other benefits of a DMD: it gives the court confidence that the prosecution is complying with its disclosure obligations; it allows the prosecution to engage with the defence at an early stage in the proceedings; and it helps to define the issues in the case.

Gross LJ endorsed the use of DMDs but cautioned that they "will require careful preparation and presentation, tailored to the individual case; pro-forma documents would be of no use" (paragraph 8.viii). To this end, they should be drafted so as to focus on the particular issues in the case.

When preparing a DMD prosecutors should consider the following:

Early preparation
The document should be prepared as soon as the prosecutor is involved in the case, and discussed at the first case conference. Disclosure counsel should assist in preparing the document, where appropriate. The document should be kept under review throughout the investigation and prosecution of the case.

Service of DMD
Early service of the DMD, at the preliminary hearing if possible, will assist the judge in case management. In particular, the judge can consider whether to endorse the prosecution's approach to disclosure, and make orders in relation to the DMD. It is recognised that early disclosure of the DMD may present practical difficulties in some cases.

Content
- Where prosecutors and investigators operate in an integrated office, such as the SFO, an explanation as to how the distinct disclosure responsibilities are kept separate.
- A statement that the prosecutor's general approach will be to comply with the CPIA statutory disclosure regime, the Attorney General's Guidelines on disclosure, and the judicial protocols.
- The prosecutor's understanding of the defence case, including interview.
- A summary of the prosecutor's approach to particular aspects of disclosure. This may include but is not limited to:
  - ❖ Digital material: explaining the method and extent of examination, in accordance with the Attorney General's Guidelines on Disclosure of Digitally Stored Material (Digital Material Guidelines).
  - ❖ Video footage.
  - ❖ Linked investigations: explaining the nexus between investigations, any MOU or disclosure agreement between investigators.
  - ❖ Third party and foreign material: explaining steps taken to obtain the material.
  - ❖ Reasonable lines of enquiry: a summary of the lines pursued, particularly those that point away from the suspect, or that may assist the defence.
  - ❖ Credibility of witnesses: confirmation that witness checks, including those of professional witnesses, have or will be carried out.

Disclosure log
The prosecutor must ensure that all disclosure decisions and actions are recorded accurately on a disclosure log. (The CPS is to mandate the use of a Disclosure Log in all VHCCs.) The log will serve as an audit trail, which may assist not only the prosecutor but also the court and the defence.

A disclosure log should prevent confusion about what material has been served, and it can assist trial preparation and instructions to counsel.

The following are examples of what might be included in the log:
- Service of unused material.
- Court orders, including monitoring compliance.
- Sensitive material and PII applications.
- Disclosure conferences.
- Working papers.
- Lines of enquiry.
- Expert evidence.
- Material held by third parties.
- Foreign material.
- Information relating to the credibility of witnesses.
- Software searches and dip sampling.
- Correspondence, including emails.
- Draft statements.
- Witness checks.

Attorney General's Guidelines on Disclosure of Digitally Stored Material
The Digital Material Guidelines were published in July 2011, to supplement the AG Guidelines on Disclosure 2005.

The Sub-group considered and broadly endorsed use of the Guidelines, which should be followed by prosecutors and investigators in all appropriate cases.

Disclosure during proceedings
There are a number of guidance documents to assist the prosecutor to control the disclosure process during court proceedings:
- The Gross Review.
- Paragraph 4 of the heavy fraud protocol.
- The protocol for the control and management of unused material in the Crown Court (the disclosure protocol);
- The CrimPRs.

<u>Pre-trial process</u>
Prosecutors and advocates should:
- Make full use of the Disclosure Management Document (see above) and the Prosecution Case Statement (see principle 7): Gross Review, recommendation 7.

- Make any foreseeable disclosure difficulties clear as soon as possible, at the preliminary hearing if possible: paragraphs 23-24, the disclosure protocol.
- Resist unrealistic time limits for the service of initial disclosure, and be fully instructed about the time required to comply with disclosure obligations: paragraph 26 of the disclosure protocol, Part 3 of the CrimPRs.
- Ensure that the defence are probed for reasons about any failure to comply with their disclosure obligations: paragraphs 27 and 32- 42 of the disclosure protocol; paragraph 3(iv)(f)(ii) of the heavy fraud protocol.
- Encourage the court to apply appropriate sanctions under the court's case management powers, where the defence fails to comply with a rule or direction. Under CrimPR 3.5(6) the court may:
  - ❖ fix, postpone, bring forward, extend, cancel or adjourn a hearing;
  - ❖ make a costs order;
  - ❖ impose such other sanction as may be appropriate.

<u>s8 CPIA applications</u>
Prosecutors and advocates should:

- Request that the defence make a proper timetabled application for disclosure, under s8 CPIA. Disclosure requests should relate to matters raised in the defence statement and, in fraud cases, defendants are expected to know what material they are looking for, and so should produce a specific, manageable and realistic list: paragraphs 43-46 of the disclosure protocol; paragraph 4(iv)–(vi)(a) of the heavy fraud cases protocol; and CrimPR 22.5.
- Encourage the court to determine spurious or weak s8 applications without a hearing, so speeding up proceedings: CPR 22.5(4)(b).
- Seek to ensure that Judges do not order disclosure of all, or a substantial volume of, the unused material, where it does not meet the test for disclosure. This "keys to the warehouse" approach has been disproved of: paragraphs 30-31 of the disclosure protocol; paragraph 4(iii) of the heavy fraud cases protocol; recommendation 10 of the Gross Review.

<u>At trial</u>
Prosecution counsel should be prepared to explain and defend prosecution disclosure decisions, with reference to the DMD and the Disclosure Log, where appropriate.

Advocates should be prepared to make comment on any defence failure to comply with disclosure obligations, as set out in s11 CPIA.

The prosecutor does not require leave of the court, except where specified, to make comment. Paragraph 42 of the disclosure protocol encourages prosecutors to make comment more often, although it cautions that it will be helpful to canvass the matter with a judge beforehand.

Principle 4

The courts and the judiciary will treat each VHCC case as a major case management exercise. Most VHCC cases should last no longer than 3 months, in accordance with the heavy fraud protocol.

Core action
- **Prosecutors will consider serving a Prosecution Case Statement**

Cradle to grave approach to trial length

The heavy fraud protocol states that most cases should conclude within 3 months, although some may last for 6 months or, exceptionally, even longer.

Justice is not best served by VHCC trials, which often involve complex evidence, being dragged out for months. Juries are in danger of being overwhelmed by their task.

Therefore, all parties to VHCC proceedings should attempt to keep trials as short and simple as possible.

However, shorter trials may not be possible in terrorism cases: it will not usually be appropriate to reduce the number of charges, limit the extent of the conspiracy or offending, or decide not to proceed against a "tail ender".

Trial length will be determined in part by working methods dating back to the start of the investigation. The cradle to grave best practice set out in this Guide should result in shorter trials due to work carried out before a case reaches court.

Judicial case management

The judge's case management powers are set out in CrimPRs Part 3 and in the heavy fraud protocol, particularly paragraph 3.

The Sub-group made a number of suggestions to the Lord Chief Justice regarding potential revisions to the heavy fraud protocol.

Preparatory hearings

In accordance with the judgment of the Court of Appeal in R. v. I. (C.) [2010] 1 Cr. App.R.10, preparatory hearings will not be necessary in most cases.

Virtually the only reason for directing such a hearing is if the judge is going to give a ruling which ought to be the subject of an interlocutory appeal. Such rulings are few and far between and do not extend to most rulings of law.

Preparatory hearings should therefore be reserved for complex or unique points of law which may be determinative of the overall conduct of the case.

Prosecution role at the first case management hearing

The onus is on the prosecutor to ensure that case management hearings are effective. Trial counsel - both prosecution and defence - should appear at these hearings.

It is essential that the trial judge is appointed early. The prosecutor should be pro-active in informing the court of the need for a trial judge to be appointed (the heavy fraud protocol stipulates that this should occur in any complex case expected to last more than four weeks).

The aim is to ensure that no pre-trial issues are left until shortly before or on the first day of trial. This is particularly relevant to Public Interest Immunity (PII) applications, which need to be heard by the trial judge, so that issues raised in the application are kept under review during trial.

At the hearing, the aim for the prosecutor is to:

- Explain what judge's orders are required.
- Clarify what is expected of the defence.
- Assist the judge to set a realistic timetable for all aspects of the case.

To this end, the prosecutor should consider serving the following material prior to the first case management hearing:

- An agenda with references to the key relevant CrimPRs.
- A summary of the steps the prosecution has taken already and the steps it expects the defence to have taken.
- A case summary or, where there has been sufficient time to prepare (non custody cases), a prosecution case statement: see below.

It is acknowledged that in some cases, such as terrorism and reactive custody cases, a number of these suggestions may not be possible until a later stage.

At the case management hearing, the prosecutor should assist the judge in carrying out case management duties by addressing:

- The documents/evidence already served by the prosecution.
- The date for service of remaining prosecution evidence.
- The Disclosure Management Document: see principle 3. The DMD will often have been served previously, although there may sometimes be time-sensitive reasons for later service.
- The admissions the prosecution is prepared to make.
- Evidence which could be adduced by way of schedules.
- A table showing key evidence in the case against each defendant.
- Any expert evidence issues, including whether an expert is required.
- The extent to which the prosecution intends to work digitally.
- Timetables for pre-trial work:
    - Timescales for work the prosecution has yet to complete.
    - Timescales for the defence to:
        - Serve the defence statement, if not already served.
        - Submit skeletons or evidence in relation to any applications.
        - Respond to draft admissions and schedules.

Judicial case management orders

The preferred approach is the practice at Southwark Crown Court: the judge directs that the prosecution produces a Minute of the Case Management

Hearing, and of any orders regarding disclosure, for circulation to and approval by the defence, after which it will be endorsed by the court.

The Minute should contain not only the judge's directions but also:

- Details of the decisions made at the hearing.
- Details of the submissions.
- Matters agreed between the prosecution and defence.

Tools to focus on the real issues in dispute

Identifying and focussing on the real issues in dispute is perhaps the simplest and most effective way to reduce trial length.

Best practice will involve proper use of the tools available for eliciting the real issues in a case. The main tools are:

- Prosecution case statement
- Timetables and guillotines
- Expert evidence
- Admissions and schedules
- Managing unrepresented defendants

Prosecution case statement

Under the preparatory hearing regimes of the CJA 1987 and the CPIA 1996, and under paragraph 3(iii)(b) of the heavy fraud cases protocol, a Judge may order the prosecutor to serve a case statement on the court and the defence.

Best practice in VHCCs will entail the prosecutor pro-actively considering whether to serve a prosecution case statement (PCS), before being ordered to do so. Prosecutors should use the PCS to identify the trial issues, assume control over the direction and length of proceedings, and assist the judge to manage the case.

The Gross Review endorses the use of a PCS by the CPS (paragraph 8.viii), and the CPS is to mandate their use in all VHCCs. As Gross LJ points out, the document should be prepared carefully, tailored to the individual case.

A PCS may not be required in a terrorism case, where the format for case summaries agreed with the Terrorism Case Management Judge may be more appropriate.

PCSs should be served as early as possible in the proceedings.

The PCS may contain:

- The allegation. Detail of the prosecution case is better placed in the prosecution case statement than in the particulars in the indictment.
- A detailed case summary. The case summary should be cross referenced to the evidence, outlining the case against each defendant and in respect of each count on the indictment.

- A schedule of the precise documents or evidence relied upon by the prosecution. The schedule should invite the defence to indicate whether it agrees or disputes each particular document or piece of evidence.
- A clear indication of which paragraphs of the summary need to be addressed in the defence statement.
- The propositions of law relied upon.

The PCS should facilitate a positive response from the other parties:
- The judge can make use of orders for the defence to respond to the PCS.
- The defence can identify the issues in dispute and live evidence required.

Timetables and guillotines
Judges are able to take charge of the trial process by a proactive approach to setting timetables and to guillotining speeches and examination of witnesses.

Best practice should be based on the case management powers set out in the CrimPRs, r3.10(b) and (d), and the approach described in the heavy fraud protocol, at paragraphs 3.vi and 6.iii-v.

Timetabling issues should be addressed at a number of stages: at the PCMH, the pre-trial review, and at trial. A detailed timetable may not be possible as early as the PCMH, in which case it should be refined at the pre-trial review.

Where a trial is estimated to go over 3 months
- The prosecution and defence should suggest in writing ways in which the case could be shortened.
- The judge may consider ways to shorten the case, such as persuading the prosecution not to pursue certain charges and/or defendants, and severing the indictment: paragraph 3.vi of the heavy fraud protocol.

At the PCMH
- The defence advocate must be fully familiar with the defence case.
- Timetabling is preferably addressed after a defence statement is served.
- Prosecution witnesses required to give oral evidence should be identified in light of the issues that arise in the defence statement.
- Defence witnesses should preferably be named before the timetable is set.
- An agreed trial schedule should be produced, which includes time estimates for speeches and witness examination.
- The schedule of prosecution witnesses should be developed in consultation with the witnesses via Witness Care Units.
- The judge will be invited to endorse the schedule and may probe whether the time envisaged for examination of a particular witness is necessary.

At the trial
- The timetable should be revisited at any subsequent pre-trial hearing and at trial, to take account of any new issues or any that have disappeared.
- Judges may be amenable to an extension of a time limit as a result of any unexpected developments. A formal application may be required.

- The defence should be able to advise the judge in advance the witnesses required and the time needed for cross examination on all issues, including questioning relating to bad character evidence relating to prosecution witnesses and co-defendants.

Guillotines

- It is not anticipated that judges will need to use their guillotine powers under rule 3.10(d) if everyone knows in advance the time to be taken.
- Judges may though intervene in cross examination where questioning is irrelevant, unnecessary or time wasting.

Expert evidence

The following approach should ensure that expert evidence is used properly:

- Consideration should always be given to whether expert evidence is actually required, whether for the prosecution or the defence. Sometimes the point which an expert is asked to give evidence on could be made in a common sense way without using an "expert".
- There is a distinction to be made between legal points (which should be dealt with by legal argument) and matters which require expert evidence.
- Expert evidence may be avoided where a glossary of terms can be agreed.
- Expert evidence should be obtained at the investigation stage, where possible. Instructions should ensure the expert's evidence is focussed only on the issue(s) which require the expert's input.
- If in the view of either party expert evidence is not required, not reliable, or not admissible, the judge should be invited to hear submissions.
- In accordance with paragraph 3.viii of the heavy fraud protocol and CrimPR 33.6(2), where expert evidence is relied on, a joint statement should be made by the experts, identifying points of agreement and contention, and areas where the prosecution is put to proof. It is important to obtain as much agreement as possible, and in clear terms that a jury can understand.
- Where there is a series of trials, the same expert evidence may not need to be called at each trial. A more efficient approach may be to reduce the expert's evidence to admissions following the first trial.

Admissions and schedules

Early agreement as to areas of admitted evidence has potential to reduce significantly the length of trial.

Parties should seek to maximise the use of admissions and schedules, so that s9 statements and live witnesses are focussed only on the issues in the case.

The prosecution should draw up a table of admissions, cross-referenced to the evidence.

The defence should indicate whether they agree the admissions. To do so, the defence will be required to read the case papers sufficiently early.

Where an agreement cannot be reached, or the defence refuses to co-operate, the judge may seek to clarify the issues, and encourage the parties

to make admissions. Where necessary, the judge will be able to exercise appropriate case management powers.

Exhibits can often be dealt with by way of a schedule of admissions. For instance, an admission summarising the contents of an exhibits book can preclude the need to serve a large number of continuity statements.

Managing unrepresented defendants
Dealing with an unrepresented defendant in cases involving multiple defendants is problematic. Particular problems are presented by defendants who dismiss their legal representation at a very late stage.

Case management powers should be exercised robustly but fairly to ensure that trials involving unrepresented defendants focus on disputed issues, and are not unnecessarily long.

Where there are co-defendants, care should be taken not to prejudice the fair trial of the remaining defendants, such as ensuring that the unrepresented defendant does not introduce inadmissible material.

Guidance on how to prevent an unrepresented defendant gaining an advantage he would not otherwise have by abusing the rules in relation to evidence and repetition when cross examining is contained in the judgement of Lord Bingham C.J in R v. Brown (Milton) [1998] 2 Cr.App.R., 364.

At the conclusion of the prosecution case, judges may address an unrepresented defendant in relation to his right to give evidence in his defence using the form of words contained in the Consolidated Criminal Practice Direction at paragraph IV.44.5.

Judges may also find it necessary to provide some assistance to unrepresented defendants, either in writing or orally, on matters of procedure and law, to ensure a fair trial.

Principle 5
All abuse of process applications will be conducted in accordance with the management of heavy fraud protocol: full written submissions should be provided; oral evidence will seldom be relevant; and hearings should conclude within a day.

Core action
- **Abuse of process arguments will usually be conducted by written submissions only.**

Abuse applications have a proper place in the trial process. However, the power to stay proceedings for abuse is limited to occasions where the defendant would not receive a fair trial and/or it would be unfair for the defendant to be tried: R v Beckford [1996] 1 Cr.App.R.94. Arguably, a number

of abuse applications in VHCC / heavy fraud cases are conducted with little prospect of this test being met by the end of the application.

Paragraph 5 of the heavy fraud protocol addresses the misuse of abuse applications in large fraud cases. However, the protocol is not always followed: where witnesses are called to give live evidence hearings invariably last for more than a day.

Although there may on occasion be good reason for a departure from the general rule, efforts should be made to adhere to the protocol, so as to promote the efficiency of VHCC litigation.

Some of the specific problems which should be avoided are:

- Many abuse arguments are not successful and there is little or no merit in many of these.
- Abuse hearings can be lengthy, taking up days of court time.
- Satellite litigation can have an adverse effect on case management. For instance, where abuse applications are made during the course of the trial, the defence may argue that the delay caused by the application is such that the jury should be discharged. That said, on occasion abuse arguments will only become apparent during the course of a trial, and it may be proper to allow the defence to make an abuse application in such circumstances.
- The issue in VHCC abuse arguments is often disclosure related, and disclosure issues might be dealt with by way of s8 applications instead.
- There is a tendency on occasion to make abuse allegations against the investigator, prosecutor or counsel, often on the basis of a disclosure failure, and to request that they give live evidence at an abuse hearing. A difference of opinion on how to apply the disclosure test, a different approach to disclosure on a linked case, or even a poor disclosure decision, does not by itself necessarily amount to a failure to comply with disclosure obligations or an abuse of the court's process. However, it is acknowledged that oral examination of witnesses is sometimes necessary, such as where a serious and justifiable criticism is made of the investigator's or prosecutor's handling of a case; and where oral evidence is necessary, it may require a number of days to complete the hearing.

A case by case approach is the best way to assess whether an abuse argument should be heard and, if so, whether it should be conducted by written or oral submissions.

Principle 6
Electronic working will become the norm in VHCC cases.

Core actions

- **There will be routine use of digital working or EPPE in VHCCs.**
- **Live video links to prisons, police stations and witnesses will be used where appropriate.**

Routine use of EPPE in VHCC cases

Electronic Preparation and Presentation of Evidence (EPPE) makes large scale, document intensive cases, easier and cheaper to manage, and it allows faster completion of cases.

EPPE is also an effective and simple way of explaining what might otherwise be dull or complicated evidence, such as money flows and telephone evidence. Use of PowerPoint presentation assists jurors in following lengthy opening and closing speeches.

Therefore, best practice in digital working in VHCC cases will regularly involve use of all three elements of EPPE:

- Scanning to convert paper-based evidence into electronic format.
- Building electronic presentations of evidence for use in the review, service and presentation of a case.
- Provision and installation of hardware in courtrooms.

However, the timetable for the introduction of full digital working and use of EPPE in VHCCs will depend upon:

- Defence practitioners' incentives to use digital working, in particular secure email.
- Availability of IT equipment at courts.
- Defendants in custody being provided with access to computers and other electronic media where necessary, to enable preparation of the defence for trial.
- Empirical evidence of juries' ability to follow VHCCs when presented in EPPE format.

Digital working and EPPE best practice

The cost and benefit of using EPPE needs to be considered on a case by case basis by the prosecutor. Flexibility and pragmatism is required during the transition to digital working, so that the principles and best practice are applied only where appropriate and in the right cases.

The following best practice is encouraged where digital working / EPPE is used:

- Investigators should use the case preparation elements of EPPE in-house.
- There should be compatibility of systems used by all CJS parties.
- The primary file in the prosecutor's office will be digital.
- The in-house prosecutor should plan for EPPE requirements at the initial planning stage of a case
- The prosecution and defence should agree the trial issues at a sufficiently early stage for the evidence to be uploaded onto the EPPE system.
- VHCC / EPPE cases should be served on encrypted discs, secure email (CJSM) or, if available for large cases, via a CJS repository.
- If available, the defence and courts should also use the repository for serving documents, such as defence statements and judge's directions.
- A protocol for managing electronic correspondence should be drafted by the prosecutor, and agreed by the defence and the court.

- Defendants in custody should be provided with access to computers, USB drives, media devices or disks where that is necessary to enable preparation of the defence case for trial.
- Prosecutors, defence advocates and judges will increasingly work electronically in court, by use of a laptop or similar device. However, where judges prefer to work with a paper bundle that should be accommodated.
- The prosecutor will ensure that unrepresented defendants have access to the case papers, whether electronically, or by way of a paper bundle.
- All directions should be recorded and made available in digital form.
- There will be a continuing need, not just in the interim period of moving to full digital working, for paper documents to be provided. A paper core bundle of essential documents should be provided to judges and jurors where necessary.
- Listing of EPPE cases should take into account availability of courts equipped with EPPE facilities.
- The person operating the EPPE system in court should have a good knowledge of the content: for instance, a member of the investigation or prosecution team.
- EPPE facilities should be installed in the jury room. Alternatively, material shown at trial on EPPE should be copied onto CD for the jury.
- An accurate record of evidence produced at court should be kept by the court or the prosecution for archiving /appeal purposes.
- All witness care in future should be carried out digitally.
- Each agency will store those documents for which it is responsible, so there will be no or little overlap of archiving.

Use of video technology and the virtual court

Video should be used wherever it offers a more cost effective alternative to the physical movement of people, provided the interests of justice are protected.

Live links from courts to prisons and police stations

There is a presumption that live links will be used in preliminary hearings in the magistrates' court where the accused is in custody: ss 57B(1) and 57B(6) of the Crime and Disorder Act 1998 (CDA). A live-link may also be used where the preliminary hearing is in the Crown Court and the accused is in custody: s57B(1) CDA, although there is no presumption that this will happen.

Where the accused is in police detention, preliminary hearings in a magistrates' court may take place over a live link, provided the court is satisfied that it is not contrary to the interests of justice: s57C(6A). However, there is no presumption that this will be the case.

In VHCCs, although live links between the court and prison may not be relevant to many fraud cases, where few defendants are remanded in custody (RIC), they are more likely to be used in terrorism and organised crime cases.

Live links to defendants are particularly useful for case management hearings, any short court proceedings and sentencing.

However, not all defendants are suitable or eligible for this style of interaction. Defendants need to be present in court for trials (save for vulnerable defendants who successfully apply to give evidence by live link), and may sometimes need to be present at other hearings, particularly the PCMH.

Live links should therefore be used flexibly so as to allow the defence face to face contact with the defendant where necessary.

Where live links are used, it is essential that arrangements are made so that any conference between a defendant and the legal representative via video link is secure and conducted in private, so as to preserve confidentiality.

It is also desirable that:

- The LSC provide a mechanism for Legal Aid applications for those only contacted via video link.
- Time delays are limited by ensuring: the proper functioning of equipment; the availability of facilities for defence advocates at court; sufficient police personnel to staff the virtual court at the police station.

Witness evidence by video link

Live links may be used for all witnesses. The court must be satisfied that it is "in the interests of the efficient and effective administration of justice", and must consider all the circumstances of the case when deciding whether to give a direction under section 51 of the Criminal Justice Act 2003.

The main advantage in VHCCs will be for evidence from overseas jurisdictions. Bringing witnesses to court from other countries can be very costly. Therefore, in appropriate cases, an application should be made under section 32 of the Criminal Justice Act 1988 for evidence to be given through a live link by a witness who is outside the UK.

However, the presumption in VHCCs remains that witnesses will give evidence in court in person, so that juries are properly engaged with the case.

When decisions are made on applying for and granting live links for witnesses, the following factors need to be taken into account:

- The level of investment required to provide the live link.
- Any savings to be made may depend on the relative travel costs involved.
- Some witnesses may need to be accompanied or assisted with the jury bundle. This may be done via video link and by the jury bundle being provided electronically. Where suitable equipment is available, the witness could give evidence from their local police station.
- Certain witnesses will invariably be required to attend court, as the prosecution or defence may wish to test the witnesses' evidence in person before the jury.

Principle 7

Wherever applicable, asset recovery and/or compensation will be an integral part of the litigation.

Core action

- **VHCCs will usually involve a financial investigation, restraint and confiscation proceedings.**

With the exception of terrorism cases, most VHCC defendants - such as fraud suspects, corporates and suspected members of organised crime groups - will possess realisable assets. It is therefore expected that a financial investigation will take place in all VHCCs, followed by confiscation proceedings on conviction.

Safeguards

It is important to ensure that safeguards are in place to ensure that only appropriate cases are taken forward and that they are dealt with in a proper manner.

- Investigators and prosecutors should engage early in criminal investigations in order to ensure a common strategy.
- Prosecutors should follow the DPP's Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings.
- The prosecution team should ensure that it discharges its disclosure obligations in respect of financial material, which is sometimes overlooked.
- FROs may be used in appropriate cases, as a tool to mitigate the threat and risks of further crime and use of criminal proceeds.
- Confiscation issues should be taken into account when considering and drafting SOCPA agreements.

A practical approach to confiscation

Where confiscation proceedings are anticipated, there are a number of practical steps that may be taken to progress cases effectively:

- Restraint orders should be obtained whenever appropriate to ensure that assets are available for enforcement.
- Restraint applications in VHCCs and heavy fraud cases in London (save for Terrorism cases) should be made in the first instance to Southwark Crown Court, or Kingston Crown Court for CPS Central Fraud Group fiscal fraud cases, where judges have developed an expertise in restraint issues in such cases.
- Restraint applications in VHCCs and heavy fraud cases outside London (save for Terrorism cases) should be heard in a Court Centre designated for the prosecution of organised crime, as set out in the Management of Cases from the Organised Crime Division of the Crown Prosecution Service Guideline, or in a Court Centre designated for the prosecution of CPS Central Fraud Group cases, as set out in the Management of Central Fraud Group Cases Guideline.
- Prosecutors should however be aware of the guidance of Hooper LJ in R v Windsor and Hare [2011] EWCA Crim 143, that restraint applications

should where possible be addressed in the first instance by the same judge who dealt with any applications for investigative orders.

- The issues in confiscation hearings are often narrow, such as hidden assets, and it will be helpful if the judge encourages the parties to identify the issues as early as possible.
- Where a defendant intends to plead guilty, or where a Plea Agreement is being negotiated, the prosecution should seek to obtain early agreement with the defence on confiscation issues.
- Although it will not always be practical in large cases, where possible, the financial investigator should try to ensure that the section 16 Prosecutor's Statement has been prepared in time for the sentencing hearing, so as to promote settlement of confiscation issues at the sentencing hearing and to enable a realistic timetable to be set.
- The Court Progression Officer can play an active role in encouraging parties to serve documents within the times set.
- The case of *R v May & others* [2008] 1 AC 1028 sets out the three questions that must be asked in every case, namely:
  - did the defendant benefit from his offending?
  - if so what was the value of that benefit?; and finally
  - what is the realisable amount?

  It is necessary to be realistic when answering these questions, and to take into account where the defendant fits into the chain of criminality.
- Benefit values should be based on realistic valuations of the property obtained.
- In setting the value of the realisable amount, it is necessary to be realistic both about the value that property is likely to realise on a forced sale and the extent of any third party claims. The realisable assets and their values should be recorded on the 5050 and 5050A forms at court.
- Hidden assets are generally difficult to fully enforce. However, it is anticipated that closer working with international partners will allow investigators and prosecutors to more easily trace and identify hidden assets in future cases. It will therefore be appropriate to include these assets in the Prosecutor's Statement, and to take them into account when negotiating a settlement. It may also be appropriate to seek a hidden assets order when it would have a significant impact on the length of the default sentence.

Compensation

- Under section 13(6) Proceeds of Crime Act 2002 (POCA), where both a confiscation order and a compensation order is made, and the person has insufficient funds to pay both, the compensation sum may be ordered to be paid out of the confiscation order.
- Accordingly, an application for a compensation order should always be considered by the investigator and prosecutor.
- Since there is no provision to apply for a compensation order once proceedings have ended, prosecutors should provide counsel with the information and forms required to make an application for each victim.

Enforcement

- Prosecutors should only enforce confiscation orders if:
  - There is a restraint order in place;
  - An enforcement receiver is to be appointed; or
  - A letter of request is required for enforcement abroad.
- This will probably apply in a large number of VHCCs. The prosecutor and financial investigator should agree at an early stage on the powers to be used in the enforcement process.
- In the event that prosecutors can no longer add value, they will remit enforcement cases to HMCTS.

Corporates

Where companies are involved in the alleged offending, there are a number of factors that investigators and prosecutors should consider:

- A company can be the subject of a confiscation order, and the company assets can be considered as part of the benefit and realisable assets.
- There can be no custodial sentence in default of payment against a company. Therefore, to ensure enforcement, where necessary a management receiver can be used as part of the restraint process, and an enforcement receiver can be appointed post conviction.
- Where the corporate entity appears to be a sham, or simply the alter ego of the individual(s) behind the company, the prosecutor may apply to lift the corporate veil and prosecute the individual(s). In such cases, the relevant proceeds of crime unit should be consulted at an early stage, as the issue may be relevant to restraint proceedings.

Third parties

Third parties will often claim ownership of identified assets and this may cause delay and additional expense.

Spouses will often commence matrimonial proceedings following a confiscation order, and as confiscation orders do not have a priority in matrimonial proceedings there is a danger that these proceedings can be used as a device to retain the proceeds of crime within a family.

Obtaining a listing for the hearing of confiscation enforcement cases linked to matrimonial cases can also cause delay, as it is generally necessary to have the two cases heard before a judge who is able to deal with both sets of proceedings. In pre-POCA 2002 cases, both the enforcement proceedings and the matrimonial proceedings are heard in the High Court, and the court is able to make the necessary arrangements. In POCA 2002 cases though, a national procedure has yet to be agreed.

Consideration should therefore be given to a better mechanism for dealing with cases in which matrimonial proceedings involving claims for property relief run in parallel with confiscation enforcement in the Crown Court.

Prosecutors should adopt a tactical approach to address the risks posed by third party claims:

- Early restraint is important in cases in which third parties hold property or claim an interest, so that the subsequent confiscation order has priority.
- A clause can be inserted into restraint applications requiring the defendant/suspect to notify the prosecutor of any application under the Matrimonial Causes Act 1973 (MCA). Once notified, the prosecutor can intervene in the proceedings and request that the restraint proceedings be given priority, or that the High Court application should take into consideration the aims and objectives of the restraint order. If with knowledge of the restraint the respondent continues to effect a matrimonial settlement, it may be appropriate to consider a money laundering charge.
- Prosecutors should consider money laundering charges for third parties who are involved in criminal behaviour. If there is insufficient evidence to charge money laundering offences, but the evidence suggests that there may be a tax liability or tax evasion, the information should be referred to the HMRC Criminal Taxes Unit for consideration.
- In order to establish the *bona fides* of third party claims, prosecutors should consider the use of disclosure orders under section 357 of Part 8 POCA, or an application for an ancillary order under section 41(7) POCA, to obtain documents and information from third parties and their financial advisors.

Confiscation and cash forfeiture

Where cash is seized in a criminal investigation, it is possible to bring civil cash forfeiture proceedings in the magistrates' court. Under ACPO guidance a decision whether to bring such proceedings is for the police (or other agency) that would have conduct of the proceedings.

However, such proceedings can adversely impact on any criminal prosecution or confiscation proceedings relating to the same cash seizure. For instance, proceeding with a cash forfeiture hearing prior to the criminal trial could give rise to abuse of process arguments: see *R v Payton* [2006] EWCA 1226.

Moreover, the existence of two separate court processes relating to the same criminal proceeds, is an inefficient use of resources.

To limit the occasions where proceedings run concurrently in two separate courts, early discussions should take place between the investigator and the prosecutor, to agree the appropriate strategic approach.

In particular, prosecutors should alert investigators to:

- Cases where criminal proceedings are likely to be prejudiced, and provide legal advice on whether civil proceedings should be brought or adjourned.
- The requirement in civil cash forfeiture proceedings for the investigator to show the type or types of offending that gave rise to the proceeds: R v Angus 2011 EWHC 461, Admin.

Prosecutors should be aware of the availability of a formal process to adjourn forfeiture hearings sine die: once the form G is served to apply for the forfeiture hearing, the seized monies become available for inclusion in the confiscation proceedings: see R v Weller EWCA Crim 810.

Principle 8
Advanced litigation and case management skills should be promoted and encouraged.

Core actions
- **VHCC prosecutors will use a Knowledge Information Management site to share best practice.**
- **Advanced litigation mentors should assist prosecutors to manage VHCC litigation.**
- **Post-case reviews will be held by investigators and prosecutors in all VHCCs.**

Knowledge information management site
It is desirable that prosecutors have access to a dedicated knowledge information management (KIM) site to share best practice. The purpose of a KIM site is to provide prosecutors with access to an electronic workspace which hosts the knowledge, training, documentation and peer support that should be available to those who prosecute VHCCs. A KIM site should additionally promote consistency in conduct of VHCC litigation.

The main suggested components of a VHCC KIM site are:
- Induction course.
- Electronic training modules.
- Templates.
- Post trial de-briefs to share lessons learnt.
- Topics subsets, such as sentencing, disclosure, abuse of process.
- Offences subsets, such as financial markets frauds, MTICs, war crimes.
- Legal guidance and information, including case law, transcripts of rulings, AG consents guidance.
- Bulletin board to share best practice ideas as they arise.
- A space to ask questions and receive answers.
- Power Point presentations and speeches.
- Parliamentary Questions.
- Protocols and MOUs.

Where practicable, it would be useful for investigation lawyers and, if possible, other third parties to have access to KIM sites. This may be possible where parts of the KIM site are made accessible to specific users only.

Advanced litigation mentors
Advanced litigation mentors should be identified in each prosecution agency. The aim is to educate and support VHCC prosecutors in their management of VHCC litigation, so embedding good practice within various prosecution teams.

Three types of mentoring may be applied to VHCC work:
- Induction mentoring.

- Case mentoring:
  - ❖ in-house prosecutor.
  - ❖ leading counsel.
- General mentoring.

Induction mentoring
Prosecutors new to VHCC work will benefit from being assigned a mentor during their first 3-6 months in post. The mentor's role will be to provide support and advice while the prosecutor is learning how to manage VHCCs.

Case mentoring
- In-house prosecutor

Most VHCC cases will have more than one in-house prosecutor assigned to the case. Where a prosecutor is not experienced in handling a particular type of case, even if experienced in other VHCCs, the prosecutor should act as the in-house junior. The in-house lead prosecutor will be experienced in the type of case in question. The role of the junior will depend on the amount of experience acquired and ability: more experienced juniors will be able to take on more tasks independently, with the leader simply supervising much of the work. However, the process should not be used simply to allow inexperienced prosecutors to learn on the job.
- Leading counsel

The lead advocate on VHCCs will invariably be independent counsel. It is important to apply the same standards of practice to counsel, and to involve leading counsel in the mentoring process. Counsel may mentor not only the junior advocate but also, to varying degrees, the in-house prosecutors. The exact working relationship between leading counsel and the in-house prosecutors will depend on their relative experience and areas of expertise, and therefore will need to be flexible, and agreed on a case by case basis.

General mentoring
This involves a more structured approach to the role of the senior prosecutor, who would act as a general mentor to junior prosecutors. The role would be part of the career development of those prosecuting and managing VHCCs. This role could encompass induction mentoring, described above. A short training course may be appropriate for those identified as general mentors.

Post-case reviews
Investigation and prosecution authorities should review all VHCC cases on completion, with a view to monitoring and developing best practice.

The development of KIM sites would assist to draw upon the conclusions of wash-ups in other cases, and to establish a shared pool of expertise.

The following good practice is suggested for wash-up conferences:
- The aim of a case review is to learn and record lessons for the future.
- The meeting should be held as soon as possible after the end of the trial.
- There should be a clear written agenda tailored to the particular case.

- Parties should prepare for the wash-up from the beginning of a case. All involved should be asked to note errors and successes as soon as they are apparent and be ready to identify them at the wash-up. Errors should, of course, be remedied at the time, if possible, but noted anyway.
- There should be particular focus on disclosure decisions and their consequences, as this is where vast time and effort are expended.
- Team members present at the trial should note how much of the evidence served is actually used. In VHCCs large swathes of exhibits are often never deployed. Although there may be good reason for this, for example, the use of admissions, it is worth checking whether clearly superfluous evidence was served. The same check should be applied to unnecessary witnesses.
- Note the developing predictions from both sides as to length of trial and compare them to the actual trial length.
- Ensure that there is available at the wash-up a concise record of all preliminary hearings and consequent directions.
- Be prepared to review decisions made during the trial, for example, to abandon a count or to apply to amend the indictment.
- Advocates should provide a critical self-appraisal. For example, did I handle this cross examination of defendant 3 the wrong way?

Control and management of heavy fraud and other complex criminal cases

A protocol issued by the Lord Chief Justice of England and Wales – 22 March 2005

INTRODUCTION

There is a broad consensus that the length of fraud and trials of other complex crimes must be controlled within proper bounds in order:

i. To enable the jury to retain and assess the evidence which they have heard. If the trial is so long that the jury cannot do this, then the trial is not fair either to the prosecution or the defence.

ii. To make proper use of limited public resources: see *Jisl* [2004] EWCA Crim 696 at [113] – [121].

There is also a consensus that no trial should be permitted to exceed a given period, save in exceptional circumstances; some favour 3 months, others an outer limit of 6 months. Whatever view is taken, it is essential that the current length of trials is brought back to an acceptable and proper duration.

This Protocol supplements the Criminal Procedure Rules and summarises good practice which experience has shown may assist in bringing about some reduction in the length of trials of fraud and other crimes that result in complex trials. Flexibility of application of this Protocol according to the needs of each case is essential; it is designed to inform but not to prescribe.

This Protocol is primarily directed towards cases which are likely to last eight weeks or longer. It should also be followed, however, in all cases estimated to last more than four weeks. This Protocol applies to trials by jury, but many of the principles will be applicable if trials without a jury are permitted under s. 43 of the Criminal Justice Act 2003.

The best handling technique for a long case is continuous management by an experienced Judge nominated for the purpose.

It is intended that this Protocol be kept up to date; any further practices or techniques found to be successful in the management of complex cases should be notified to the office of the Lord Chief Justice.

(i) The role of the prosecuting authority and the judge

a. Unlike other European countries, a judge in England and Wales does not directly control the investigative process; that is the responsibility of the Investigating Authority, and in turn the Prosecuting Authority and the prosecution advocate. Experience has shown that a prosecution lawyer (who

must be of sufficient experience and who will be a member of the team at trial) and the prosecution advocate, if different, should be involved in the investigation as soon as it appears that a heavy fraud trial or other complex criminal trial is likely to ensue. The costs that this early preparation will incur will be saved many times over in the long run.

b. The judge can and should exert a substantial and beneficial influence by making it clear that, generally speaking, trials should be kept within manageable limits. In most cases 3 months should be the target outer limit, but there will be cases where a duration of 6 months, or in exceptional circumstances, even longer may be inevitable.

(ii) Interviews

a. At present many interviews are too long and too unstructured. This has a knock-on effect on the length of trials. Interviews should provide an opportunity for suspects to respond to the allegations against them. They should not be an occasion to discuss every document in the case. It should become clear from judicial rulings that interviews of this kind are a waste of resources.

b. The suspect must be given sufficient information before or at the interview to enable them to meet the questions fairly and answer them honestly; the information is not provided to give the suspect the opportunity to manufacture a false story which fits undisputable facts.

c. It is often helpful if the principal documents are provided either in advance of the interview or shown as the interview progresses; asking detailed questions about events a considerable period in the past without reference to the documents is often not very helpful.

(iii)The prosecution and defence teams

a. *The Prosecution Team*
While instructed, it is for the lead advocate for the prosecution to take all necessary decisions in the presentation and general conduct of the prosecution case in court. The prosecution lead advocate will be treated by the court as having that responsibility.
However, in relation to policy decisions, the lead advocate for the prosecution must not give an indication or undertaking which binds the prosecution without first discussing the issue with the Director of the Prosecuting authority or other senior officer.
"Policy" decisions should be understood as referring to non-evidential decisions on: the acceptance of pleas of guilty to lesser counts or groups of counts or available alternatives: offering no evidence on particular counts; consideration of a re-trial; whether to lodge an appeal; certification of a point of law; and the withdrawal of the prosecution as a whole (for further information see the 'Farquharson Guidelines' on the role and responsibilities of the prosecution advocate).

b. EM>The Defence Team
In each case, the lead advocate for the defence will be treated by the court as

having responsibility to the court for the presentation and general conduct of the defence case.

c. In each case, a case progression officer must be assigned by the court, prosecution and defence from the time of the first hearing when directions are given (as referred to in paragraph 3 (iii)) until the conclusion of the trial.

d. In each case where there are multiple defendants, the LSC will need to consider carefully the extent and level of representation necessary.

(iv)Initial consideration of the length of a case

If the prosecutor in charge of the case from the Prosecuting Authority or the lead advocate for the prosecution consider that the case as formulated is likely to last more than 8 weeks, the case should be referred in accordance with arrangements made by the Prosecuting Authority to a more senior prosecutor. The senior prosecutor will consider whether it is desirable for the case to be prosecuted in that way or whether some steps might be taken to reduce its likely length, whilst at the same time ensuring that the public interest is served.

Any case likely to last 6 months or more must be referred to the Director of the Prosecuting Authority so that similar considerations can take place.

(v) Notification of cases likely to last more than 8 weeks

Special arrangements will be put in place for the early notification by the CPS and other Prosecuting Authorities, to the LSC and to a single designated officer of the Court in each Region (Circuit) of any case which the CPS or other Prosecuting Authority consider likely to last over 8 weeks.

(vi)Venue

The court will allocate such cases and other complex cases likely to last 4 weeks or more to a specific venue suitable for the trial in question, taking into account the convenience to witnesses, the parties, the availability of time at that location, and all other relevant considerations.

2. DESIGNATION OF THE TRIAL JUDGE

(i) The assignment of a judge

a. In any complex case which is expected to last more than four weeks, the trial judge will be assigned under the direction of the Presiding Judges at the earliest possible moment.

b. Thereafter the assigned judge should manage that case "from cradle to grave"; it is essential that the same judge manages the case from the time of his assignment and that arrangements are made for him to be able to do so. It is recognised that in certain court centres with a large turnover of heavy cases (e.g. Southwark) this objective is more difficult to achieve. But in those court centres there are teams of specialist judges, who are more

readily able to handle cases which the assigned judge cannot continue with because of unexpected events; even at such courts, there must be no exception to the principle that one judge must handle all the pre-trial hearings until the case is assigned to another judge.

3. CASE MANAGEMENT

(i)Objectives

a. The number, length and organisation of case management hearings will, of course, depend critically on the circumstances and complexity of the individual case. However, thorough, well-prepared and extended case management hearings will save court time and costs overall.

b. Effective case management of heavy fraud and other complex criminal cases requires the judge to have a much more detailed grasp of the case than may be necessary for many other Plea and Case Management Hearings (PCMHs). Though it is for the judge in each case to decide how much pre-reading time he needs so that the judge is on top of the case, it is not always a sensible use of judicial time to allocate a series of reading days, during which the judge sits alone in his room, working through numerous boxes of ring binders.
See paragraph 3 (iv) (e) below.

(ii)Fixing the trial date

Although it is important that the trial date should be fixed as early as possible, this may not always be the right course. There are two principal alternatives:

a. The trial date should be fixed at the first opportunity – i.e. at the first (and usually short) directions hearing referred to in subparagraph (iii). From then on everyone must work to that date. All orders and pre-trial steps should be timetabled to fit in with that date. All advocates and the judge should take note of this date, in the expectation that the trial will proceed on the date determined.

b. The trial date should not be fixed until the issues have been explored at a full case management hearing (referred to in subparagraph (iv), after the advocates on both sides have done some serious work on the case. Only then can the length of the trial be estimated.

Which is apposite must depend on the circumstances of each case, but the earlier it is possible to fix a trial date, by reference to a proper estimate and a timetable set by reference to the trial date, the better.

It is generally to be expected that once a trial is fixed on the basis of the estimate provided, that it will be **increased** if, and only if, the party seeking to extend the time justifies why the original estimate is no longer appropriate.

(iii)The first hearing for the giving of initial directions

At the first opportunity the assigned judge should hold a short hearing to give initial directions. The directions on this occasion might well include:

a. That there should be a full case management hearing on, or commencing on, a specified future date by which time the parties will be properly prepared for a meaningful hearing and the defence will have full instructions.

b. That the prosecution should provide an outline written statement of the prosecution case at least one week in advance of that case management hearing, outlining in simple terms:

    i. The key facts on which it relies.

    ii. The key evidence by which the prosecution seeks to prove the facts.

   The statement must be sufficient to permit the judge to understand the case and for the defence to appreciate the basic elements of its case against each defendant. The prosecution may be invited to highlight the key points of the case orally at the case management hearing by way of a short mini-opening. The outline statement should not be considered binding, but it will serve the essential purpose in telling the judge, and everyone else, what the case is really about and identifying the key issues.

c. That a core reading list and core bundle for the case management hearing should be delivered at least one week in advance.

d. Preliminary directions about disclosure: see paragraph 4.

(iv)The first Case Management Hearing

a. At the first case management hearing:

    i. The prosecution advocate should be given the opportunity to highlight any points from the prosecution outline statement of case (which will have been delivered at least a week in advance).

    ii. Each defence advocate should be asked to outline the defence.

   If the defence advocate is not in a position to say what is in issue and what is not in issue, then the case management hearing can be adjourned for a short and limited time and to a fixed date to enable the advocate to take instructions; such an adjournment should only be necessary in exceptional circumstances, as the defence advocate should be properly instructed by the time of the first case management hearing and in any event is under an obligation to take sufficient instructions to fulfil the obligations contained in S 33–39 of Criminal Justice Act 2003.

b. There should then be a real dialogue between the judge and all advocates for the purpose of identifying:

    i. The focus of the prosecution case.

    ii. The common ground.

    iii. The real issues in the case. (Rule 3.2 of the Criminal Procedure Rules.)

c. The judge will try to generate a spirit of co-operation between the court and the advocates on all sides. The expeditious conduct of the trial and a focussing on the real issues must be in the interests of **all** parties. It cannot be in the interests of any defendant for his good points to become lost in a welter of uncontroversial or irrelevant evidence.

d. In many fraud cases the primary facts are not seriously disputed. The real issue is what each defendant knew and whether that defendant was dishonest. Once the judge has identified what is in dispute and what is not in dispute, the judge can then discuss with the advocate how the trial should be structured, what can be dealt with by admissions or agreed facts, what uncontroversial matters should be proved by concise oral evidence, what timetabling can be required under Rule 3.10 Criminal Procedure Rules, and other directions.

e. In particularly heavy fraud or complex cases the judge may possibly consider it necessary to allocate a whole week for a case management hearing. If that week is used wisely, many further weeks of trial time can be saved. In the gaps which will inevitably arise during that week (for example while the advocates are exploring matters raised by the judge) the judge can do a substantial amount of informed reading. The case has come "alive" at this stage. Indeed, in a really heavy fraud case, if the judge fixes one or more case management hearings on this scale, there will be need for fewer formal reading days. Moreover a huge amount can be achieved in the pre-trial stage, if all trial advocates are gathered in the same place, focussing on the case **at the same time**, for several days consecutively.

f. Requiring the defence to serve proper case statements may enable the court to identify:

   i. what is common ground and

   ii. the real issues.

   It is therefore important that proper defence case statements be provided as required by the Criminal Procedure Rules; Judges will use the powers contained in ss 28–34 of the Criminal Proceedings and Evidence Act 1996 (and the corresponding provisions of the CJA 1987, ss. 33 and following of the Criminal Justice Act 2003) and the Criminal Procedure Rules to ensure that realistic defence case statements are provided.

g. Likewise this objective may be achieved by requiring the prosecution to serve draft admissions by a specified date and by requiring the defence to respond within a specified number of weeks.

(v) Further Case Management Hearings

a. The date of the next case management hearing should be fixed at the conclusion of the hearing so that there is no delay in having to fix the date through listing offices, clerks and others.

b. If one is looking at a trial which threatens to run for months, pre-trial case management on an intensive scale is essential.

(vi) Consideration of the length of the trial

a. Case management on the above lines, the procedure set out in paragraph 1 (iv), may still be insufficient to reduce the trial to a manageable length; generally a trial of 3 months should be the target, but there will be cases where a duration of 6 months or, in exceptional circumstances, even longer may be inevitable.

b. If the trial is not estimated to be within a manageable length, it will be necessary for the judge to consider what steps should be taken to reduce the length of the trial, whilst still ensuring that the prosecution has the opportunity of placing the full criminality before the court.

c. To assist the judge in this task,

    i. The lead advocate for the prosecution should be asked to explain why the prosecution have rejected a shorter way of proceeding; they may also be asked to divide the case into sections of evidence and explain the scope of each section and the need for each section.

    ii. The lead advocates for the prosecution and for the defence should be prepared to put forward in writing, if requested, ways in which a case estimated to last more than three months can be shortened, including possible severance of counts or defendants, exclusions of sections of the case or of evidence or areas of the case where admissions can be made.

d. One course the judge may consider is pruning the indictment by omitting certain charges and/or by omitting certain defendants. The judge must not usurp the function of the prosecution in this regard, and he must bear in mind that he will, at the outset, know less about the case than the advocates. The aim is achieve fairness to all parties.

e. Nevertheless, the judge does have two methods of pruning available for use in appropriate circumstances:

    i. Persuading the prosecution that it is not worthwhile pursuing certain charges and/or certain defendants.

    ii. Severing the indictment. Severance for reasons of case management alone is perfectly proper, although judges should have regard to any representations made by the prosecution that severance would weaken their case. Indeed the judge's hand will be strengthened in this regard by rule 1.1 (2) (g) of the Criminal Procedure Rules. However, before using what may be seen as a blunt instrument, the judge should insist on seeing full defence statements of all affected defendants. Severance may be unfair to the prosecution if, for example, there is a cut-throat defence in prospect. For example, the defence of the principal defendant may be that the defendant relied on the advice of his accountant or solicitor that what was happening was acceptable. The defence of the professional may be that he gave no such advice. Against that background, it might be unfair to the prosecution to order separate trials of the two defendants.

(vii)The exercise of the powers

a. The Criminal Procedure Rules require the court to take a more active part in case management. These are salutary provisions which should bring to an end interminable criminal trials of the kind which the Court of Appeal criticised in *Jisl* [2004] EWCA 696 at [113] – [121].

b. Nevertheless these salutary provisions do not have to be used on every occasion. Where the advocates have done their job properly, by narrowing the issues, pruning the evidence and so forth, it may be quite inappropriate for the judge to "weigh in" and start cutting out more evidence or more charges of his own volition. It behoves the judge to make a careful assessment of the degree of judicial intervention which is warranted in each case.

c. The note of caution in the previous paragraph is supported by certain experience which has been gained of the Civil Procedure Rules (on which the Criminal Procedure Rules are based). The CPR contain valuable and efficacious provisions for case management by the judge on his own initiative which have led to huge savings of court time and costs. Surveys by the Law Society have shown that the CPR have been generally welcomed by court users and the profession, but there have been reported to have been isolated instances in which the parties to civil litigation have faithfully complied with both the letter and the spirit of the CPR, and have then been aggrieved by what was perceived to be unnecessary intermeddling by the court.

(viii)Expert Evidence

a. Early identification of the subject matter of expert evidence to be adduced by the prosecution and the defence should be made as early as possible, preferably at the directions hearing.

b. Following the exchange of expert evidence, any areas of disagreement should be identified and a direction should generally be made requiring the experts to meet and prepare, after discussion, a joint statement identifying points of agreement and contention and areas where the prosecution is put to proof on matters of which a positive case to the contrary is not advanced by the defence. After the statement has been prepared it should be served on the court, the prosecution and the defence. In some cases, it might be appropriate to provide that to the jury.

(ix)Surveillance Evidence

a. Where a prosecution is based upon many months' observation or surveillance evidence and it appears that it is capable of effective presentation based on a shorter period, the advocate should be required to justify the evidence of such observations before it is permitted to be adduced, either substantially or in its entirety.

b. Schedules should be provided to cover as much of the evidence as possible and admissions sought.

4.DISCLOSURE

In fraud cases the volume of documentation obtained by the prosecution is liable to be immense. The problems of disclosure are intractable and have the potential to disrupt the entire trial process.

i. The prosecution lawyer (and the prosecution advocate if different) brought in at the outset, as set out in paragraph 1 (i)(a), each have a continuing responsibility to discharge the prosecution's duty of disclosure, either personally or by delegation, in accordance with the Attorney General's Guidelines on Disclosure.

ii. The prosecution should only disclose those documents which are relevant (i.e. likely to assist the defence or undermine the prosecution – see s. 3 (1) of CPIA 1996 and the provisions of the CJA 2003).

iii. It is almost always undesirable to give the "warehouse key" to the defence for two reasons:

    a. This amounts to an abrogation of the responsibility of the prosecution;

    b. The defence solicitors may spend a disproportionate amount of time and incur disproportionate costs trawling through a morass of documents.

    The Judge should therefore try and ensure that disclosure is limited to what is likely to assist the defence or undermine the prosecution.

iv. At the outset the judge should set a timetable for dealing with disclosure issues. In particular, the judge should fix a date by which all defence applications for specific disclosure must be made. In this regard, it is relevant that the defendants are likely to be intelligent people, who know their own business affairs and who (for the most part) will know what documents or categories of documents they are looking for.

v. At the outset (and before the cut-off date for specific disclosure applications) the judge should ask the defence to indicate what documents they are interested in and from what source. A general list is not an acceptable response to this request. The judge should insist upon a list which is specific, manageable and realistic. The judge may also require justification of any request.

vi. In non-fraud cases, the same considerations apply, but some may be different:

    a. It is not possible to approach many non-fraud cases on the basis that the defendant knows what is there or what they are looking for. But on the other hand this should not be turned into an excuse for a "fishing expedition"; the judge should insist on knowing the issue to which a request for disclosure applies.

    b. If the bona fides of the investigation is called into question, a judge will be concerned to see that there has been independent and effective appraisal of the documents contained in the disclosure schedule and that its contents are adequate. In appropriate cases where this issue has arisen and there are grounds which show there

is a real issue, consideration should be given to receiving evidence on oath from the senior investigating officer at an early case management hearing.

5. ABUSE OF PROCESS

i. Applications to stay or dismiss for abuse of process have become a normal feature of heavy and complex cases. Such applications may be based upon delay and the health of defendants.

ii. Applications in relation to absent special circumstances tend to be unsuccessful and not to be pursued on appeal. For this reason there is comparatively little Court of Appeal guidance: but see: *Harris and Howells* [2003] EWCA Crim 486. It should be noted that abuse of process is not there to discipline the prosecution or the police.

iii. The arguments on both sides must be reduced to writing. Oral evidence is seldom relevant.

iv. The judge should direct full written submissions (rather than "skeleton arguments") on any abuse application in accordance with a timetable set by him; these should identify any element of prejudice the defendant is alleged to have suffered.

v. The Judge should normally aim to conclude the hearing within an absolute maximum limit of one day, if necessary in accordance with a timetable. The parties should therefore prepare their papers on this basis and not expect the judge to allow the oral hearing to be anything more than an occasion to highlight concisely their arguments and answer any questions the court may have of them; applications will not be allowed to drag on.

6.THE TRIAL

(i)The particular hazard of heavy fraud trials

A heavy fraud or other complex trial has the potential to lose direction and focus. This is a disaster for three reasons:

a. The jury will lose track of the evidence, thereby prejudicing both prosecution and defence.

b. The burden on the defendants, the judge and indeed all involved will become intolerable.

c. Scarce public resources are wasted. Other prosecutions are delayed or – worse – may never happen. Fraud which is detected but not prosecuted (for resource reasons) undermines confidence.

(ii)Judicial mastery of the case

a. It is necessary for the judge to exercise firm control over the conduct of the trial at all stages.

b. In order to do this the judge must read the witness statements and the documents, so that the judge can discuss case management issues with the advocates on – almost – an equal footing.

c. To this end, the judge should not set aside weeks or even days for pre-reading (see paragraph 3 (i)(b) above). Hopefully the judge will have gained a good grasp of the evidence during the case management hearings. Nevertheless, realistic reading time must be provided for the judge in advance of trial.

d. The role of the judge in a heavy fraud or other complex criminal trial is different from his/her role in a "conventional" criminal trial. So far as possible, the judge should be freed from other duties and burdens, so that he/she can give the high degree of commitment which a heavy fraud trial requires. This will pay dividends in terms of saving weeks or months of court time.

(iii) The order of the evidence

a. By the outset of the trial at the latest (and in most cases very much earlier) the judge must be provided with a schedule, showing the sequence of prosecution (and in an appropriate case defence) witnesses and the dates upon which they are expected to be called. This can only be prepared by discussion between prosecution and defence which the judge should expect, and say he/she expects, to take place: See: Criminal Procedure Rule 3.10. The schedule should, in so far as it relates to Prosecution witnesses, be developed in consultation with the witnesses, via the Witness Care Units, and with consideration given to their personal needs. Copies of the schedule should be provided for the Witness Service.

b. The schedule should be kept under review by the trial judge and by the parties. If a case is running behind or ahead of schedule, each witness affected must be advised by the party who is calling that witness at the earliest opportunity.

c. If an excessive amount of time is allowed for any witness, the judge can ask why. The judge may probe with the advocates whether the time envisaged for the evidence-in-chief or cross-examination (as the case may be) of a particular witness is really necessary.

(iv)Case management sessions

a. The order of the evidence may have legitimately to be departed from. It will, however, be a useful for tool for monitoring the progress of the case. There should be periodic case management sessions, during which the judge engages the advocates upon a stock-taking exercise: asking, amongst other questions, "where are we going?" and "what is the relevance of the next three witnesses?". This will be a valuable means of keeping the case on track. Rule 3.10 of the Criminal Procedure Rules will again assist the judge.

b. The judge may wish to consider issuing the occasional use of "case management notes" to the advocates, in order to set out the judge's tentative views on where the trial may be going off track, which areas of future

evidence are relevant and which may have become irrelevant (e.g. because of concessions, admissions in cross-examination and so forth). Such notes from the judge plus written responses from the advocates can, cautiously used, provide a valuable focus for debate during the periodic case management reviews held during the course of the trial.

(v)Controlling prolix cross-examination

a. Setting **rigid** time limits in advance for cross-examination is rarely appropriate – as experience has shown in civil cases; but a timetable is essential so that the judge can exercise control and so that there is a clear target to aim at for the completion of the evidence of each witness. Moreover the judge can and should indicate when cross-examination is irrelevant, unnecessary or time wasting. The judge may limit the time for further cross-examination of a particular witness.

(vi)Electronic presentation of evidence

a. Electronic presentation of evidence (EPE) has the potential to save huge amounts of time in fraud and other complex criminal trials and should be used more widely.

b. HMCS is providing facilities for the easier use of EPE with a standard audio visual facility. Effectively managed, the savings in court time achieved by EPE more than justify the cost.

c. There should still be a core bundle of those documents to which frequent reference will be made during the trial. The jury may wish to mark that bundle or to refer back to particular pages as the evidence progresses. EPE can be used for presenting all documents not contained in the core bundle.

d. Greater use of other modern forms of graphical presentations should be made wherever possible.

(vii) Use of interviews

The Judge should consider extensive editing of self serving interviews, even when the defence want the jury to hear them in their entirety; such interviews are not evidence of the truth of their contents but merely of the defendant's reaction to the allegation.

(viii)Jury Management

a. The jury should be informed as early as possible in the case as to what the issues are in a manner directed by the Judge.

b. The jury must be regularly updated as to the trial timetable and the progress of the trial, subject to warnings as to the predictability of the trial process.

c. Legal argument should be heard at times that causes the least inconvenience to jurors.

d. It is useful to consider with the advocates whether written directions should be given to the jury and, if so, in what form.

(ix) Maxwell hours

a. Maxwell hours should only be permitted after careful consideration and consultation with the Presiding Judge.

b. Considerations in favour include:

   i. Legal argument can be accommodated without disturbing the jury;

   ii. There is a better chance of a representative jury;

   iii. Time is made available to the judge, advocates and experts to do useful work in the afternoons.

c. Considerations against include:

   i. The lengthening of trials and the consequent waste of court time;

   ii. The desirability of making full use of the jury once they have arrived at court;

   iii. Shorter trials tend to diminish the need for special provisions e.g. there are fewer difficulties in empanelling more representative juries;

   iv. They are unavailable if any defendant is in custody.

d. It may often be the case that a maximum of one day of Maxwell hours a week is sufficient; if so, it should be timetabled in advance to enable all submissions by advocates, supported by skeleton arguments served in advance, to be dealt with in the period after 1:30 pm on that day.

(x) Livenote

If Livenote is used, it is important that all users continue to take a note of the evidence, otherwise considerable time is wasted in detailed reading of the entire daily transcript.

(i) Defence representation and defence costs

a. Applications for change in representation in complex trials need special consideration; the ruling of HH Judge Wakerley QC (as he then was) in *Asghar Ali* has been circulated by the JSB.

b. Problems have arisen when the Legal Services Commission have declined to allow advocates or solicitors to do certain work; on occasions the matter has been raised with the judge managing or trying the case.

c. The Legal Services Commission has provided guidance to judges on how they can obtain information from the LSC as to the reasons for their decisions; further information in relation to this can be obtained from *Nigel Field, Head of the Complex Crime Unit, Legal Services Commission, 29–37 Red Lion Street, London, WC1R 4PP.*

(ii)Assistance to the Judge

Experience has shown that in some very heavy cases, the judge's burden can be substantially offset with the provision of a Judicial Assistant or other support and assistance.

Annex A
Potential revisions to the heavy fraud protocol

The Sub-group suggests the following revisions to the "control and management of heavy fraud and other complex criminal cases", a protocol issued by the Lord Chief Justice of England and Wales in 2005:

1. Designation of court centres

The Sub-group accepted the overall approach of bespoke listing under the leadership of the Resident and Presiding Judges.

However, the Sub-group commented that although various protocols designate specific court centres to conduct particular classes of work, cases that are initially sent to these courts are sometimes subsequently transferred to non-designated courts.

It would therefore be helpful if the protocols were rationalised further, so that maximum use is made of designated courts, containing both judicial expertise and appropriate facilities for large cases.

2. Maxwell Hours

The Heavy Fraud Protocol permits the use of Maxwell Hours only after careful consideration and consultation with the Presiding Judge.

However, the Sub-group noted it may not always be necessary to seek the Presiding Judge's permission to sit Maxwell hours, for example, for one week of a much longer trial, given the powers and culture of case management that has evolved since the Heavy Fraud Protocol came into force in 2005.

3. Preliminary Hearings

Various protocols exist in relation to different types of cases:

- The "Heavy fraud – Southwark Crown Court – First Hearing" protocol, for the first hearing in large frauds.
- The protocol for the "Management of Revenue and Customs Prosecutions Office Cases", applicable to HMRC investigated cases.
- The protocol on the "Management of Cases from the Organised Crime Division of the CPS", which relates to SOCA investigated cases.
- The protocol for the "Management of Terrorism Cases".

The timetables in these protocols for the service of documents and other actions are not aligned. For instance, the timetable in respect of the prosecution service of the case summary and core bundle of documents in the RCPO protocol is delayed until 42 days after the first case management hearing, rather than 42 days after the date of the preliminary hearing, as in the heavy fraud protocol at Southwark Crown Court.

Although it is not suggested that all timetables in the protocols be aligned, case progression may be improved in some VHCCs by:

i. **The timings in the RCPO protocol being brought into line with the protocol at Southwark Crown Court.**

ii. **The Southwark Crown Court timetable being adhered to in SFO cases and HMRC investigated VHCCs brought outside London, unless the court directs otherwise.**

4. Abuse of Process

The Subgroup advised that a case by case approach is the best way to assess whether an abuse argument should be heard and, if so, whether it should be conducted by written or oral submissions.

Paragraph 5.iii. of the protocol states that “oral evidence is seldom relevant”. The Sub-group thought that it would be helpful to insert a test into the protocol for the introduction of oral evidence.

Specifically, it suggested applying an “exceptional cases” test, whereby witnesses shall only be called after the party who wishes to call them makes a successful application to the judge in advance of the hearing.

This would not only ensure that live evidence is only heard where necessary but would also assist judges in their case management duties, and enable them to conduct proceedings more efficiently.

Annex B
Core actions performance metrics

Case management panels will meet regularly to actively supervise the investigation and prosecution of VHCCs

Did panel members have sufficient skills, experience and expertise?
Were all relevant case issues identified for / by the panel?
Did the panel check the existence and quality of key documents?
Did the panel provide adequate advice where required?
Was a risk assessment carried out and reviewed where necessary?

There will be a document setting out the investigation strategy

Is there a written investigation strategy?
Was the prosecutor consulted on the strategy at an early stage?
Did the search strategy target material with precision?
Was there appropriate use of s2 CJA/ s62 SOCPA notices, including consideration of Article 6 issues?
Does the strategy set out an adequate disclosure plan?
Was there consideration to limiting the time and scope of the investigation, and number of suspects, while appropriately reflecting the overall criminality?
Were the evidential lines pursued consistent with the defined scope of the investigation.

There will be a document setting out the prosecution strategy

Is there a written prosecution strategy?
Is the strategy consistent with the investigation strategy?
Does the strategy set out an adequate disclosure plan?
Were interview plans discussed with the investigator?
Does the strategy consider alternatives to prosecution, such as civil recovery and Serious Crime Prevention Orders?
Was there consideration to limiting the time and scope of the investigation, and number of suspects, while appropriately reflecting the overall criminality?
Were the evidential lines pursued consistent with the defined scope of the investigation.

The selection of charges will ensure cases are as small and focussed as possible

Do the charges reflect the investigation and prosecution strategies?
Are the charges focussed, in terms of:

i. the number of defendants;
ii. the scope of offending; and
iii. the time period?

Prosecutors will consider initiating plea discussions in every VHCC involving a serious or complex fraud

Were plea discussions considered?
Was there a good reason for entering / not entering into plea discussions?
Did any discussions produce a plea agreement?

Prosecutors will consider the use of a disclosure management document

Was a DMD used?
Did the DMD identify all disclosure issues in the case?
Was the DMD brought to the attention of the defence and court at an early stage?
Did the prosecution and defence agree the approach to disclosure contained in the DMD?
Did the judge endorse the prosecutor's approach to disclosure?

Prosecutors will record all disclosure decisions and actions in a disclosure log

Was an adequate disclosure log kept?

The AG's Guidelines on the Disclosure of Digitally Stored Material should be applied by prosecutors and investigators in all appropriate cases

Were the Guidelines followed in respect of disclosure of digital material?

Prosecutors will consider serving a prosecution case statement

Was a PCS served?
Did the PCS identify all the trial issues?
Did the PCS assist the trial judge to manage the case?
Did the PCS prompt the defence to:

i. issue a response;
ii. identify the trial issues; and
iii. produce or revise a defence statement?

Abuse of process arguments will usually be conducted by written submissions only

Where there was an abuse argument was it identified and heard prior to trial?
Were all disclosure issues dealt with by way of s8 applications as opposed to abuse arguments?
Did the abuse hearing last longer than a day?
Was oral evidence only called where necessary?

There will be routine use of digital working or EPPE in VHCCs

Was full digital working / EPPE used?

Live video links to prisons, police stations and witnesses will be used where appropriate

Were live links to prisons, police stations and witnesses used where appropriate?

VHCCs will usually involve a financial investigation, restraint and confiscation proceedings

Were assets identified and restraint considered at a sufficiently early stage?
Were restraint orders obtained where appropriate?
Where hidden assets were included in the confiscation order, was it possible to fully enforce the order?

Were third party claims dealt with adequately?
Where cash was seized, did the investigator and prosecutor agree an appropriate strategic approach?
Was a compensation order considered?

VHCC prosecutors will use a knowledge information management (KIM) site to share best practice
Did the case team refer to material on a dedicated KIM site to assist its case preparation?
Did the case team input anything onto a dedicated KIM site to assist others?

Advanced litigation mentors should assist prosecutors to manage VHCC litigation
Were litigation mentors used in the case?

Post-case reviews will be held by investigators and prosecutors in all VHCCs.
Was a post-case review held?
Were any specific lessons learned?
Have any learned lessons been disseminated adequately (for instance, via a KIM site)?