

then it was too late for him to do anything about it. Now, however, the judge – or at least the procedural judge – knows, and must know, a great deal about the parties' evidence and Part 32 of the CPR actually gives him power to control the evidence. For how long will he be able to hold, and for how long will he wish to hold, the unattractive line of denying that he has a duty to the truth?

I have suggested that today's generation of lawyers, who were brought up under the old system and are bound to see the post-Woolf law as to some extent a departure from the norm, will continue to find obstacles to harmonisation – real or imagined. They may even be right, if they focus on topics outside civil procedure as I have defined it for this lecture and which it has not been possible for me to mention, such as the differences between the Continental and the English judiciary and legal professions.

But I believe that in time – when the new Civil Procedure Rules have become the system in which all but the most ancient of lawyers were brought up – then it will be realised that our law is not, in its modes of thought and

in its underlying, unstated, assumptions, any longer so different from the Continental.

I believe, therefore, that the proposition of Professor Storme and of the authors of the transnational rules, with which I earlier expressed disagreement, was premature rather than wrong for all time. If that is right, and if it is right that there is already an important and growing degree of unconscious harmonisation – convergence, to use a word now fashionable in economics – then the idea that deliberate harmonisation has a realistic prospect of success will cease to seem far-fetched. Isolationist approaches to the reform of civil procedure will cease to be sustainable, and what was not, after all, a paradox, will actually become one, unless we pay greater attention to the procedural systems of other countries and their reform. I hardly need say that the same goes for those others as well. 

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The labyrinth of major fraud

by George Staple QC

The author, a partner in Clifford Chance and a former Director of the Serious Fraud Office, addresses the issue of overlap between different investigations and proceedings in major fraud cases and offers some suggestions for harmonisation.

It must be counted a blessing of the English legal system that when a major financial scandal breaks there is available a range of different processes, each one specially designed to respond to a different facet of the case.

But anyone who has been involved with one of the major fraud cases of recent years (whether as investigator, regulator, prosecutor, victim or defendant) cannot help but ask whether a system with so much overlap between different investigations and proceedings cannot be made to work more efficiently.

Our system involves enormous expense and delay, and there is now real concern about the impact on such delay of the European Convention on Human Rights (ECHR). In a recent case before the Court of Human Rights in

which directors' disqualification proceedings had been stayed until the end of the criminal trial, the court found unacceptable delay, which was contrary to the right to a fair trial under art. 6 of the convention. So the problem has become urgent.

THE RANGE OF PROCEEDINGS

Let us just pause a moment to consider the range and nature of all these different processes.

- Criminal proceedings may be brought by the Serious Fraud Office, CPS or other prosecuting authorities, e.g. HM Customs & Excise or the Inland Revenue. The criminal process is, of course, concerned with the attribution of blame to a particular individual or group of individuals.

- Civil proceedings may be brought by the Financial Services Authority against those subject to its powers. They may also be brought by liquidators against those who may have defrauded the company, or by the DTI for disqualification of company directors. But mainly they will be brought by victims as private litigants seeking to redress private law wrongs and to remedy loss suffered.
- Regulatory proceedings may be brought by regulators within the FSA regulatory system or by professional bodies such as the Office for the Supervision of Solicitors or the Accountants' Joint Disciplinary Scheme. These are directed to upholding a statutory or self-regulatory scheme in the public interest.
- Proceedings before an ombudsman (e.g. pensions or financial services ombudsmen) may be brought by private parties and are intended to provide a quicker and cheaper means of remedying loss than civil proceedings.
- The whole matter may also be the subject of an investigation by the DTI inspectors under the Companies Act or the Financial Services Act. The purpose here is to find out how the fraud occurred and to consider the merits of criminal proceedings, but also to assess its impact in the wider context together with possible law reform.
- Lastly, proceedings may be brought by the FSA in respect of insider trading, market manipulation or money laundering, either as criminal offences or within the market abuse regime being set up under the Financial Services and Markets Act.

These different sets of proceedings have been refined over many years by the legislature and by case law better to meet the needs of many different types of case. A balance has been struck between all the different interests involved, and one therefore approaches reform with the utmost caution. However, in a complex case, problems undoubtedly arise because it brings into play so many different parts of the system at the same time.

In his KPMG lecture in June 1998 the Lord Chancellor articulated the problem in an imaginary, but nonetheless perfectly credible, case of banking fraud in which no less than eight sets of proceedings arose on the same set of facts.

I also vividly remember the *Sumitomo* case, which arose shortly before I left the Serious Fraud Office. The case, you will remember, involved allegations of cornering the copper market. The public prosecutors in Japan investigated and proceeded against Mr Hamanaka, the man alleged to have been responsible for what had happened. Simultaneously in the UK there was a Securities and Futures Authority inquiry into the conduct of brokers. There was also a London Metal Exchange inquiry focusing on the conduct of its members. There

was an inquiry by the Securities and Investments Board as the senior regulator, and the SEC in the United States was active, as were the US Commodities Regulators. The Serious Fraud Office was also investigating with a view to possible prosecution of individuals in this country and finally, there was massive civil litigation, which rumbles on to this day – at least half a dozen class actions and actions by Sumitomo. There were almost as many sets of proceedings in Maxwell and BCCI, and one can cite many other examples.

THE RISKS INVOLVED

More specifically, the risks to which all this legal activity taking place at the same time, or at least in quick succession, give rise are considerable:

- There is duplication of resources in investigations by the police and other investigating authorities.
- There is a risk of inconsistent decisions in different proceedings on the same set of facts.
- There are difficulties faced by defendants having to defend in a number of different fora at the same time.
- There is a risk of double jeopardy, and in particular there is the potential for the proceedings and decisions in one process prejudicing the proceedings and decisions in another.
- There is the risk posed by multiple use of evidence that was gained initially only for a single purpose.
- There are the potentially conflicting roles of an individual in various proceedings: for example, being a witness in criminal proceedings and also being a defendant in disciplinary proceedings. Someone in this position may as a result be inhibited from giving information to the prosecuting authorities.
- Finally there is the lack of adequate gateways for sharing information, which may result in some authorities having insufficient information on which effectively to proceed.

WHO GOES FIRST?

Multiplicity of proceedings also inevitably raises the issue of which should go first: criminal, civil or regulatory. There could be tactical advantages for a defendant, for example, if the civil proceedings were to go before the criminal, as the defendant might be able to obtain more information through the rules of discovery in the civil process than would be available to him, at least initially, in the criminal process. On the other hand, if the civil or regulatory proceedings were to go before the criminal trial, then the defendant could risk premature disclosure of his defence.

The position is complicated by the scope of the privilege against self-incrimination. It is available in criminal cases, but not necessarily in an investigation. The privilege may

be excluded by the rules of self-regulatory bodies – so that where the privilege is abrogated or excluded, the defendant may have to reveal information in one set of proceedings or investigation that he would not have to reveal in another. The issue of priority and of the subsequent admissibility of the evidence in different proceedings is thus of critical importance to him.

THE INVESTIGATION STAGE

How have we attempted to bring a degree of co-ordination to all these different processes? Let us first look at the investigation stage. There are no formal rules stipulating that any one set of investigations has priority over any other, nor are there any requirements on the sharing of information obtained. Each authority has a wide set of powers to obtain oral and documentary information, and legislation allows the transfer of information between authorities. When in the *Sumitomo* case all the authorities wanted to get their hands on the evidence and interview the witnesses at the same time, it was frankly only good informal liaison between them which enabled an orderly process to take place.

It is good news, however, that guidelines have been drawn up by the Financial Services Authority and the SFO for determining when priority should be assigned as between those two authorities. This is particularly important now that under the new Financial Services and Markets Act the Financial Services Authority will have powers of criminal prosecution in relation to insider trading, market manipulation and money laundering and also the capacity to bring regulatory proceedings for market abuse.

But the passage of information between public bodies and potential private litigants, including liquidators, is somewhat restricted. Generally, banks, legal and accountancy professionals and liquidators can be required to provide information to public authorities, but information cannot move in the other direction. For example, it cannot move from public authorities to liquidators, at least not without the consent of the person giving the information. There are no provisions permitting the disclosure of information by public authorities to other potential private litigants. The poor old victim, yet again, misses out.

THE PROCEEDINGS STAGE

When we get beyond the investigation to the stage of legal or regulatory proceedings, according to the type of proceedings, different rules apply in relation to disclosure and standards of proof. So which proceedings are to have priority may be all important.

In the common law jurisdictions criminal proceedings normally take precedence over civil proceedings. Indeed in contrast, for example, to Germany, the courts here do not have the power to stay criminal proceedings pending the outcome of other proceedings. Civil proceedings, on

the other hand, can be stayed pending the conclusion of criminal proceedings (although there is no general rule that they should be stayed) in order not to prejudice the defendant's position in the criminal trial.

As I have already said, it could be to the advantage of the defendant that the civil proceedings come before the criminal, as the defendant may be able to obtain more information through the rules of discovery than he could from the prosecution in a criminal trial. In the US this situation is addressed by the prosecuting authorities applying for a stay of the civil proceedings (which are usually being brought by the SEC) and the SEC will usually not object. Indeed, if the stay is not granted the case has sometimes been dismissed without prejudice to re-filing in order to avoid damaging the criminal case.

OVERLAP

... anyone who has been involved with one of the major fraud cases of recent years (whether as investigator, regulator, prosecutor, victim or defendant) cannot help but ask whether a system with so much overlap between different investigations and proceedings cannot be made to work more efficiently.

The relationship between regulatory proceedings and civil proceedings has been an issue of recent concern. Although the courts have the power to stay regulatory proceedings, the general principle appears to be that they will exercise the power cautiously, and only where there is a real risk of serious prejudice which may lead to injustice. Factors that the court will take into account in deciding whether or not to stay regulatory proceedings include:

- the degree of overlap between them;
- the prejudice that may be caused by disclosure of documents in the regulatory proceedings that would not be available in civil proceedings;
- whether a decision in the regulatory proceedings would prejudice the fair trial of the civil proceedings;
- whether the defendant would be able properly to defend two sets of simultaneous proceedings; and
- whether the public interest lies in the urgent resolution of regulatory proceedings.

REFORM

The Lord Chancellor's proposal

What then can be done, in particular, to curb some of the delay inherent in the system, which now runs the risk of falling foul of the European Convention on Human Rights? The Lord Chancellor has made a bold and imaginative suggestion on the following lines. He proposed a single set of proceedings. These would be responsible for hearing criminal charges, producing

reports from investigations and imposing disciplinary sanctions on directors and professionals. The proceedings would be heard by a High Court judge and two expert assessors.

The criminal stage would be heard first, and a jury would sit for that stage. The judge and expert assessors would be encouraged to take an inquisitorial role and to ask detailed questions of witnesses. Once a verdict had been reached at that stage, the jury would be dismissed. The judge and expert assessors would then consider the remaining issues under less stringent rules of evidence. More of the story could thus come out.

The judge and assessors would prepare a report akin to those that follow a Companies Act or Financial Services Act investigation, and it could provide for directors' disqualification. The tribunal could also determine regulatory sanctions, if the relevant regulatory body had agreed to join the proceedings and itself bring charges. Civil proceedings would remain outside the unified procedure, and would have to wait until the conclusion of the procedure before they could begin.

SAFEGUARDS

A system is ... required which would encourage guilty defendants to plead guilty, while at the same time protecting them from improper pressure to do so. The safeguards would have to ensure that any discussions would take place in the presence of the defendants and their advisers, and the discussions would in all cases be recorded ...

To ensure co-ordination of the appropriate bodies before the procedure began, the relevant regulatory and prosecuting authorities would have to notify each other at an early stage that they were investigating the matter and likely to take action. They would also be required to pool information. Once the SFO, for instance, had decided to bring criminal charges, the other authorities would have to decide within a reasonably short period of time (four months was suggested by the Lord Chancellor) whether they were going to join the procedure and bring charges themselves. The judge and expert assessors would be able to exercise powers of case management which now operate in civil litigation. If the criminal case were appealed, the Court of Appeal would be required to rule at an early stage and the rest of the unified procedure would have to be stayed until the appeal was heard.

The Working Group's response

The Lord Chancellor emphasised that he was not announcing any government decisions, promoting any new policies, nor taking any personal initiatives. He was merely asking questions and seeking views.

In the course of its work on parallel proceedings the Society for Advanced Legal Studies' Working Group on Financial Regulation gave careful consideration to these questions and offered the following views.

Undoubtedly the idea of a single body responsible for judging and grading the many degrees of wrongdoing following the judge's decision on criminal liability has very considerable attraction. The regulatory investigation would take place after the criminal trial, so the problem of a defendant, as in the case of *Ernest Saunders*, having to answer questions under compulsory powers before a criminal trial would not occur. He would only be compelled to answer questions after the trial was over, so no question of self-incrimination would arise.

Furthermore, witnesses and defendants would be aware of the purposes for which their evidence was to be used because they would know who the participating bodies were. But, above all, the unified procedure would reduce the overlap in the investigatory and trial process.

On the other side of the coin all other proceedings would have to queue up behind the criminal trial, which as we know can be a lengthy process. So far as the regulatory proceedings were concerned there was a risk that we would be designing delay into the system with all the ECHR problems to which that would give rise.

Further delay would be likely to result from interposing the fact-finding investigation in the criminal proceedings. A Companies Act inspection, for example, is intended to be a wide-ranging process to fulfil a number of different purposes. The narrow confines of the criminal proceedings, which are solely for the purpose of establishing guilt and imposing penalties seem ill-suited to this wider purpose. As the Working Group commented in its report, 'It would be difficult for a narrow trial and an investigation of much wider compass to co-exist at the trial stage.'

It also has to be recognised that acquittal in the criminal trial would sit very uneasily with subsequent regulatory proceedings and the imposition of sanctions based on a different standard of proof. The whole idea of the regulatory process playing second fiddle to the criminal process seems to fly in the face of the policy behind the Financial Services and Markets Act, which is intended to provide, through the new market abuse regime, a quicker and more effective route to sanctions for wrong-doing in financial markets.

SOME SOLUTIONS

Should we then despair of finding any way of making better sense of the multiplicity of investigations and proceedings provided by our system? I think not. With the Lord Chancellor's objectives in mind, there are a number of ways in which things can be improved.

The investigation stage

First it must be said that the reform of financial services regulation as envisaged by the Financial Services and Markets Act should have a considerable impact on parallel proceedings within the regulatory field itself. The Act brings under the umbrella of a single body nine separate regulators operating under the old system. It should substantially reduce the need for multiple investigations.

Furthermore as the powers of the Financial Services Authority and the SFO move closer together the opportunity for joint investigations by those authorities will be increased.

Secondly, investigations by DTI inspectors have been replaced in many cases by immediate investigations by the SFO. The SFO has similar powers of investigation to those of DTI inspectors. The difference, however, is that DTI inspectors produce a report whereas the SFO does not. DTI reports in the main, have been of high quality and have shed light on the way in which misconduct has occurred and how measures to prevent it in future might be introduced both in terms of company law revision and in City and boardroom practice.

The SFO in the course of its enquiries assembles a huge body of information. There would not seem to be any reason why the SFO should not, in appropriate cases, and where DTI inspectors have not been appointed, be provided with the necessary extra powers and resources in order to produce a factual report. It would probably not be possible for the report to be published prior to the end of the criminal trial. But that usually also applies to a DTI inspector's report.

For the SFO, who will be investigating thoroughly for the purpose of criminal proceedings, to produce a report would avoid considerable duplication of effort. I accept it would be a novel role for a prosecuting authority. However given that, unlike the CPS, the SFO also has responsibility for, and powers of, investigation, in the absence of a DTI report, it is not perhaps an unreasonable expectation.

Thirdly it will normally be perfectly satisfactory for criminal and regulatory proceedings to proceed in tandem, and in SFO cases information can be passed to regulators under s. 3 of the *Criminal Justice Act 1987*. This does not, however, apply to police enquiries, and a clear statutory gateway is needed to enable the police to pass information to regulators. It would speed things up on the regulatory side and avoid further duplication of effort.

Fourthly since the case of *Saunders* in the European Court of Human Rights, there has been much discussion about the use of coercive powers to question people. However these powers have, in practice, seldom been used in relation to those who will be defendants in criminal cases. Those powers are, in fact, used almost exclusively to interview those who will be witnesses at the criminal trial. Where coercive powers are used, albeit

rarely, in relation to potential defendants at the investigatory stage, it is now clear that the product cannot be put in evidence at the criminal trial. There should, therefore, be no difficulty in allowing a regulator to take part in such an interview in a criminal case, and indeed vice versa. In practice it is likely that both regulators and prosecutors will prefer to leave the questioning to one or the other, provided that the transcript is available to both.

A similar approach is likely to be appropriate where documentary evidence is obtained, either through notices or orders to produce, or through other coercive means, such as warrants. It is unlikely to be necessary for a representative of the other authority to be present, provided that the material can be shared as soon as possible afterwards.

Therefore with sensible co-operation and minimal reform of the law much could be achieved to reduce the duplication and increase efficiency at the investigation stage between the various prosecuting and regulatory authorities involved.

The proceedings stage

Firstly, it is accepted by all that nothing should be done to prejudice the fairness of criminal proceedings. But this does not mean that other proceedings cannot proceed simultaneously, or even before the criminal trial. In the *Maxwell* case this is exactly what happened to some of the civil litigation. Although there should be a presumption in favour of publication of the result of civil proceedings, if it is thought that the jury in the criminal case might be prejudiced by knowledge of it, then, as in the *Maxwell* case, the court can prohibit publication of the evidence and the result of the civil case until the criminal proceedings are over. There is no reason in principle why regulatory and disciplinary proceedings against those who are not defendants in the criminal case should not proceed as soon as the regulators are ready. The result, if prejudicial to an accused, need not be published until the criminal proceedings are over.

Secondly, the position of victims, or office-holders who represent them, who want to bring claims to recover their loss is not at all satisfactory. As in the case of the SFO, the authorities, usually quite quickly, assemble a body of material and a fairly clear picture emerges of what has happened. But that body of material is not available to civil litigants. The Working Group felt strongly that it should be made available, provided it would not prejudice criminal or regulatory proceedings. A discretion would therefore have to be reserved to the authorities, and in most cases the material could probably not be passed to civil plaintiffs until after the criminal trial.

Thirdly, building on the precedent of disqualification of directors, there is scope for an expanded role for the judge in the criminal case. There seems no reason why criminal

judges should not be given some of the powers of regulators, including intervention powers. This would enable them (i) to close down businesses that are being fraudulently run, (ii) to freeze assets before any criminal charge is made, and (iii) to order disqualification in circumstances akin to those under s. 59 of the *Financial Services Act 1986*. They should also be given greater powers to order compensation for the victims of financial crime. This would provide the trial judge with the means to impose a comprehensive package of imprisonment, fine, compensation and disqualification.

PLEA BARGAINING

It is by avoiding the contested trial, with all that that implies in terms of expense and consumption of time and manpower, that a plea of guilty represents the single most effective means of shortening the process. It has to be recognised that at present many guilty defendants plead not guilty, taking their chance of an acquittal. That may be because in weighing up their chances they have no clear idea of what the sentence would be if they pleaded guilty. But if defendants could be told by the judge what the sentence would be on a plea of guilty compared with the likely sentence on a finding of guilt after a contested trial, so that they could know the saving in cost, anxiety and length of sentence, many more might plead guilty where the odds were against an acquittal.

A system is therefore required which would encourage guilty defendants to plead guilty, while at the same time protecting them from improper pressure to do so. The safeguards would have to ensure that any discussions would take place in the presence of the defendants and their advisers, and the discussions would in all cases be recorded. There would also be a procedure which would take place before the judge for reading to the defendants a formal document setting out their rights and reminding them that they could not, and should not, plead guilty unless they accept their guilt.

Such an arrangement would represent a substantial improvement on the present system. The American system, however, goes still further. In the United States it is possible to incorporate into the plea agreement regulatory penalties, which in suitable cases, after a plea of guilty in the criminal proceedings, will, together with a lesser sentence, satisfactorily meet the demands of justice. In an appropriate case on a plea of guilty, the sentence could therefore be a lesser prison sentence than might otherwise be expected, or even a conditional discharge. The conditions could include:

- the payment of substantial fines;
- the full co-operation of the defendant with the investigation;
- the giving of evidence for the prosecution in a related case;

- restitution to the victims of fraud;
- contribution to the costs of the investigation; and
- regulatory penalties such as ceasing to do business in a particular market, or the closing-down of a firm.

The regulatory authorities in the United States take part in the negotiation of the plea agreement. The attraction of achieving quickly and efficiently what might otherwise take many months or years does not, in the light of our own experience, need to be emphasised.

CONCLUSION

So, although there does not appear to be a single big idea that would at a stroke solve the problems that arise when proceedings are initiated at different levels within the legal and regulatory structure, there are some improvements that could be made which would go quite a long way to reduce the expense and delay which at present are inevitable in a complex case.

Harmonising powers, opening gateways for sharing information and the production of reports by the SFO would help to reduce the duplication of resources.

The issue of the multiple use of information gained initially for a single purpose and the conflicting roles of individuals in different processes would be addressed by giving individuals notice, at the time of the interview, of the persons to whom the information would be given and the purposes for which it would be used.

The issue of ‘spillover’ effects and prejudice of proceedings would be addressed not by stay of proceedings – which would necessarily hinder the effectiveness of the proceedings stayed – but by non-publication of the evidence given in, and the result of, those proceedings.

Lastly by broadening the range of sanctions that could be imposed at the end of the criminal trial, integrating regulatory sanctions into the criminal process and the development of a formal system of plea bargaining, which could incorporate regulatory sanctions, substantial inroads could be made into the delay and expense which at present so besets cases of serious and complex fraud. 

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This article is based on the Society for Advanced Legal Studies’ Financial Regulation Expert Working Group’s Report on Parallel Proceedings.