

consists of three representatives of the major political parties, six people drawn from 'the great and good' and a chairman who, so far, has been a lawyer.

The committee's first report went straight to the moral issue and laid down seven principles of public life (the principles are set out in full at p.14 of the report). These are as follows:

- selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

The House of Commons adopted these and they have been widely incorporated in other codes.

As regards the bribery of MPs, the report called for a reconsideration of the issue. It recommended the adoption of better procedures for 'trying' MPs accused of misconduct. The report looked at the corruption statutes and called for their reconsideration and consolidation. It also dealt with quangos and the issue of political bias in the selection of members of quangos.


Recommendations were included for the appointment of a Parliamentary Commissioner for Standards for the House of Commons and an independent Public Appointments Commissioner to regulate the public appointments process. Both recommendations were accepted. The holders of the respective offices are Sir Gordon Downey and Sir Leonard Peach.

The committee's third report looked at local government (*Standards of Conduct in Local Government in England, Scotland, and Wales: Third Report of the Committee on Standards in Public Life*, July 1997, Cm 3702-1). In that report the committee called for better codes of discipline. It criticised the system of surcharging

local councillors and proposed a new crime of abuse of public office.

During the last few months the committee has been looking at the funding of political parties (*Fifth Report* (1998)). This obviously includes issues which I have mentioned today, i.e. the sources of funding, the processing of honours and perceived fears as to the influences being brought to bear on party leaders in consequence of the 'arms race' to fight elections on a lavish scale.

The recommendations contained in the first three reports of the committee have had the effect of stimulating much further activity. In addition there is now a climate of opinion which favours the modernisation of the law in the ongoing crusade against corruption and malpractice. Examples are furnished by Lord Nicholls' Committee of both Houses which is looking at the issue of bribery of MPs and members of the House of Lords; the Law Commission's Report *Legislating the Criminal Code: Corruption* (Law Com No 248, HC 524, 2 March 1998); and a Home Office Working Party is currently looking at a new criminal offence of 'abuse' of public office. And there is much else besides in addition to the ongoing labours of the OECD and its fight against corruption.

I hope that I have said enough to arouse your interest in the work of the Committee on Standards in Public Life and to demonstrate its relevance to the moral and legal issues addressed in the course of the symposium. 

Patrick Neill QC

## Prosecution white collar crime – what's going on?

by Rosalind Wright



Rosalind Wright

In her address to the Symposium on Economic Crime, the Director of the Serious Fraud Office posed the question 'What is wrong with the present system of trying serious and complex fraud cases?'

Lord Roskill, in his report on fraud trials 13 years ago, noted that:

*'criticisms of the judicial process in the present context have stemmed largely from the increasing length and complexity of trials of commercial fraud cases, leading many people to call into question the appropriateness of trial by jury for this type of case.'*

In that context, nothing has changed very significantly and in 1998, the problems of long and complex trials remains.

The Serious Fraud Office was set up in 1987 as a direct result of Roskill. It was given a specific and focused remit for the investigation and prosecution of serious and complex fraud. It investigates and prosecutes the very tip of the fraud iceberg – the most serious, the most complex cases – cases where there is

significant public interest, where the sums at risk exceed £1m (sometimes by a hundredfold), where there is often a transnational element; a highly complex and esoteric market background, where the complexities of commercial transactions, of audit trails and market knowledge combine to produce cases of great difficulty and enormous size.

## HOW ARE THE CHALLENGES MET?

From the SFO's perspective, remarkably successfully; in our ten and a half year history, we have convicted two out of every three defendants prosecuted. Overall, the picture is not so rosy.

As far as the trial process is concerned things have not really moved a great deal further forward since the days before Roskill. Trials are still taking months rather than weeks to try. Preparatory hearings, designed to streamline the issues and reach accord on what could be agreed by both sides before trial, are not working as well as they should. Defence Counsel are reluctant to concede points pre-trial. In many cases one is driven to the conclusion that it is in the defence's interests to prolong the trial process for as long as possible – not only is it putting off the evil day of possible conviction – but in keeping the issues blurred and unclear, the jury may not be able to see the wood for the trees and give the defendant the benefit of the doubt.

## THE ISSUES THEMSELVES

The facts in many complex fraud cases don't lend themselves to brevity and simplicity. Sustained and successful frauds often involve repeated deceptions and dishonesties in many transactions over a long period of time. To seek to reflect all the deceptions and dishonesties in the indictment would make the charges incomprehensible and the trial unmanageable both in its length and complexity. The inevitable consequence of this has been that the prosecution, often with the agreement of the defence, tends to reduce the indictment to a number of sample charges or will try part of a story with other parts to follow later in later indictments. This approach makes the dish for the jury digestible but the jury doesn't see the whole picture. This suggests that there are certain complex fraud trials where a jury is not appropriate. If the trial can't be presented before a jury without its reduction to digestible bites the jury may not convict without seeing the whole picture.

### CLOUT IS NEEDED

It needs a judge of considerable clout ... to manage a fraud trial firmly and knock heads together ... to determine what issues are truly in dispute and to prune the case to its bare bones.

In any case, it is often difficult for the prosecution to proceed to the second indictment if it has failed on the first. There is the feeling that the prosecution has proceeded on its best case first and the prosecution may be permitted to get only one bite at the cherry, as in *Maxwell* where the SFO were not allowed to proceed on the second indictment.

On the other hand, the Court of Appeal felt that the *Blue Arrow* trial was too long (13 months) and the indictment too complex for the jury to understand, and it therefore quashed the convictions.

If *Maxwell* is to be followed, there is likely to be no value to adopting a proactive approach to severance as severed matters are unlikely to be allowed to proceed. This leaves us with an even more finely balanced decision to make – ensuring that there is a sufficiently substantial case to reflect the criminality of those involved – while at the same time keeping the trial as short and simple as possible for the jury.

## THE NATURE OF THE CHARGE

When it's not clear what the criminal offence one is trying to prove is, how is a jury to be expected to extrapolate, from the facts of commercial transactions, the criminality of what is alleged? Do such concepts as 'procuring the execution of a valuable security by deception' or 'the dishonest appropriation of a chose in action' really belong in the 20th, let alone the 21st century?

There is a huge litany of possible offences to choose from in a fraud case, none of which necessarily meets the bill when technology produces a revolutionary concept such as electronic bank transfers which extinguish a credit in one bank account and open up a new one in another one so that 'property' is not obtained for the purpose of a charge under s. 15 of the *Theft Act 1968* – that was the case in *Preddy* – or where a computer automatically pays out against a fraudulent request – no human intervention, so no person was capable of being deceived.

The law must keep pace with technological development. We have, as an Office, made representations to the Law Commission, which is presently examining the law of dishonesty, in the hope that they will recommend a comprehensive substantive offence of fraud. Where there is a conspiracy between two or more people, you can present all the facts together; where only a single defendant is involved, you are not able to do that.

Modern commercial activities and the modern methods by which dishonesty may be effected makes one constantly worry that the law we have may not be able to cope. The criminal law does not at present touch the increasing prevalence of commercial espionage both by computer and otherwise. I would welcome the extension of the criminal law to this area and I hope the Law Commission's recommendations find favour or, perhaps better, that commercial espionage can be brought within our recommended offence of 'fraud'.

## OVERSEAS EVIDENCE

Another problem the SFO has to grapple with when trying to mount a case against a defendant in a serious or complex fraud case is evidence from overseas. As I have said, very many of our cases – usually about 60 or 70% of them – involve evidence or a defendant who is outside the jurisdiction. We need evidence from overseas, we need defendants from overseas, we need mutual legal assistance, we need speedier extradition. In many cases we are developing relations with other countries, notably with other European countries, so that we are able now as we weren't a few years ago, to get the sort of evidence in the form that we are able to present to an English Court; but the disparity in the procedures in different jurisdictions is still marked.

Again, getting witnesses to come over from an overseas jurisdiction to give evidence before an English court is another

huge problem. We don't have the power to compel a witness to give evidence as we could if they were within the jurisdiction. The reluctance to come overseas to become involved in a UK trial is understandable; again, after all, what is it to an overseas witness that somebody else is being investigated and prosecuted in the UK?

The co-operation we receive from most countries is improving, due I am sure to the assistance we are able to offer overseas authorities to obtain evidence for them, including the use of our powers under *Criminal Justice Act 1987*, s. 2 to obtain evidence on compulsion; but the level of co-operation does vary enormously. Some countries are only too happy to help but others are much more reluctant and are in any case inundated with requests for assistance and aren't able to give us speedily the co-operation we need.

### MANAGING THE DOCUMENTATION

The biggest problem that we face in the longest cases is the unmanageability of the evidence itself. In most cases we are faced with a huge number of files. The documentation in fraud cases is, I think, what marks them out as different from any other class of case. One of the great drawbacks of the jury system is that the jury is not able to take these files away before the trial starts and read through the documentation. One great advantage of a tribunal panel system, such as you have in the regulatory areas, is that you are able to give the regulatory tribunal all the files and documentation well in advance of the hearing of the disciplinary case and they are able, three or four weeks before the tribunal sits, to have read and understood the background to the case. The jury is not able to do that and that in itself prolongs the hearing.

The SFO is installing a document management system which will scan all the documentation that is produced in the course of an investigation and make it available on a CD-ROM. It will be readily accessible by means of automatic indexing and word recognition. Instead of presenting huge numbers of lever arch files to the defence – the number of copies multiplied by as many defendants as there are in a case – each defendant and the judge and the jury too, will be given a CD-ROM. The same will apply to unused material that we have to disclose, indexed and accessible much more easily and quickly than it was on paper and will not take up the huge acreage of space in the court and our own office. That in itself will save an enormous amount of time, space and temper.

### JUDGES

Fraud trial judges are the essential lynchpin of a successful case. To have an efficiently, effectively and economically run case, you need for these cases a judge who can not only understand commercial transactions in a wide range of markets, but be a master of the increasingly complicated legal issues in this field and, above all, capable of effective management of the trial process. It needs a judge of considerable clout – of experience and ability but above all determination and personality to manage a fraud trial firmly and knock heads together and that includes the prosecution's head, to determine what issues are truly in dispute and to prune the case to its bare bones without losing the essential elements of the alleged criminality. I am delighted that the Lord Chancellor's Department has made a start in tackling this sensitive area.

### JURIES

The time has now come to consider a replacement for the jury in the most complex and the most lengthy of these cases. And it's not because – and I must stress this – too many defendants are acquitted. We have, after all, secured convictions in every trial we have prosecuted in the last two years. Anyway, an acquittal in a criminal trial is not a disaster for the prosecution, it doesn't mean the case should never have been brought or was inadequately prosecuted. Whether the verdict is one with which I, as the prosecutor, or the judge or counsel or anybody else agrees or disagrees is beside the point. I don't, and I wouldn't, criticise a jury system because an individual jury has acquitted a defendant in one of our cases. Neither is the issue as to whether the jury is able to understand complex commercial transactions in complicated financial instruments. It's a common belief that the facts of these cases are too difficult for a jury to understand. Whether that's true or not is something we just don't know. Until controlled research is allowed we can only guess why a jury decides as they do.

In less complicated days the judges were able to direct the prosecution to pick three stages in a series of transactions, one at the beginning, one in the middle and one at the end, representing say, perhaps a hundred individual incidences of theft by an employee. The cases that the SFO handles aren't as simple as that.

To demonstrate and understand the allegations in those cases, it's necessary to understand what happened over a period of months or sometimes years, in a complex series of commercial transactions. It's in those very few cases that I think the criminal justice system is falling down at the moment. It hasn't yet caught up with the pace of modern developments in commercial business life and, as they have become more complex, so have the ways of committing offences. The process of trial by jury has simply become too unwieldy.

#### INTO THE 21ST CENTURY

Do such concepts as 'procuring the execution of a valuable security by deception' or 'the dishonest appropriation of a chose in action' really belong in the 20th, let alone the 21st century?

The Home Office has issued a consultation paper setting out suggested alternatives to trial by 12 jury members. My own preference would be a judge sitting with specially qualified lay members, not specialist assessors drawn from the area of business that is the subject matter of the case, as is the rule for regulatory disciplinary tribunals. I don't think that's an appropriate way to try these cases. What you're getting there are expert witnesses who can't be tested. You don't know how up to date the business experience is of these people who sit with the judge; they are continually feeding the judge (who is, in this sort of case, a layman himself as far as commercial or financial knowledge is concerned) market knowledge which may be out of date: it may be wrong, it may be full of prejudice – you don't know because you can't test it. If you call an expert witness from the area of business concerned he can be examined by the prosecution, he can be cross-examined by the defence, you know what he's saying, you know where he's coming from, you can test his evidence; but you can't do that when you've got experts sitting as part of the tribunal with the judge.

My preference would be for a financially or commercially-aware lay member, somebody with a banking background, somebody with an accountancy background, somebody with a stock-broking background, but sitting in a case where that sort of background is directly pertinent to the charges brought. But they would be informed, they would have the business experience. You wouldn't have to tell them what a share option was, what reinsurance was all about – or if you did they'd understand pretty quickly.

Now, whether a case is suitable for jury trial or for the alternative mode should be a decision for the judge to take, following the argument from both prosecution and the defence and subject to interlocutory appeal. A High Court judge with experience of both commercial and criminal cases should be selected to try these very special and exceptional cases.



Whatever system is put in place to try these cases must command public confidence. There is public scepticism of setting up a possible 'softer option' of trial for what people might call 'the toffs' and the traditional system for ordinary blue collar criminals. If there were acquittals, or lightish sentences of fraud defendants, you would hear again the old phrase, that this is a system of chaps letting off other chaps over lunch. They can get away with millions and get their wrists slapped, whereas an ordinary blue collar criminal who goes in with a gun and robs somebody at gunpoint of say, £10, goes to prison for 15 years; which doesn't happen to the suits.

## THE REGULATORY ROLE IN FRAUD

When does the regulator take over conduct of these complex cases and take them out of the criminal arena? The recent case of *NatWest Markets* illustrates the dilemma facing the regulatory and criminal authorities in deciding who should take on responsibility for investigating an allegation arising out of a spectacular loss, apparently occasioned on a trading desk and 'covered up' by employees. There are clear guidelines on this area drawn up by the SFO and the SIB for determination, in cases where there is an overlap between the criminal and the regulatory functions, as to where priority for action should be assigned.

Where 'priority' is accorded, it may mean that the body, either the SFO or one of the financial services regulating organisations, can expect to be left clear to proceed. The other body may be 'on hold' until either the other body has decided not to proceed further, or the stage is reached where intervention by the other body may safely proceed without prejudice to action by the first one. In some cases, the regulator may proceed with 'fringe' players, or corporations, while priority is still accorded to the prosecutor in respect of the ringleaders.

We are at a turning point in terms of regulation. The new Financial Services Authority (FSA) is to be given enhanced and very impressive powers. The FSA will have the power to make anyone caught breaching the new proposed *Code of Market Abuse* disgorge any profits made, or loss avoided as a result of the

breach; restore the position or otherwise compensate any identifiable victims of misconduct, and/or make them pay a fine aimed at deterring such misconduct and pay the costs incurred by the FSA in the investigation of the conduct in question. They will also have criminal powers which, at the moment, are the province either of the CPS and the SFO, but particularly the DTI in relation to insider dealing; they will also be able to prosecute certain forms of market abuse. As well as being able to take regulatory or civil action against abusers they will also be able to take criminal action against abusers; also to take criminal action against people for abusing money-laundering regulations and, as they do at the moment – policing the perimeter – that is, prosecute those who are unlicensed or who are unauthorised.

These are pretty awesome powers and we will have to see how readily the FSA decides to take up the cudgels and use them. The regulatory system has worked well in keeping out those people who should not be let loose on the investing public and particularly this relates to individuals who should not be employed in investment firms. The regulators have taken effective disciplinary action to stop firms and individuals who breach normal standards of market conduct. But if the time comes for the FSA to decide to bring criminal action for market manipulation or for insider dealing, I hope they have more success than the DTI have had with insider dealing cases. Insider dealing, as defined in the *Criminal Justice Act 1993* is a pretty unprosecutable offence.

The advantage of dealing with these matters in a regulatory rather than a criminal way is that the regulator doesn't have the constraints of the criminal prosecutor who has to prove the mens rea of a crime – the dishonest intent – and the requirement of proof beyond reasonable doubt. Secondly, the regulator is concerned with high standards of market conduct, not solely those acts which demonstrate dishonesty; so care, skill and diligence are equally important concerns of the regulator – so is integrity – a wider concept than merely keeping within the strict ambit of the criminal law.

Regulatory action, rather than criminal prosecution, may prove in the end a more effective weapon for sure-fire attack on unacceptable market practices which have, in many cases, escaped the clutches of the criminal law enforcement agencies. The real added-value that the regulator brings to the investigation and prosecution of serious and complex financial fraud is its role in the early detection of fraudulent activity; the one element in the Roskill equation that I mentioned earlier that the SFO makes no attempt to undertake. The role of the regulator in constant vigilance, surveillance and monitoring, detects and, above all, goes a long way to prevent complex fraud in the first place.

## ONE STOP SHOPPING?

To make criminal trials for fraud more effective, from the regulatory as well as the criminal points of view, I suggest that criminal judges can be given some of the powers of the regulators; intervention powers to close down seemingly fraudulently run businesses, or limit some of their commercial activities at an early stage; freezing the assets of a company or of an individual defendant before any criminal charge is made; being able to impose disqualification not only as a company director, but in a wider context, as the regulator now can do, under *Financial Services Act 1986*, s. 59 – a comprehensive

'banning order' a blacklisting from all commercial and financial activities. And what about increased and more meaningful powers to award compensation to those who are victims of financial crime?

It seems to me that an enormous duplication of effort goes into the criminal investigation and trial of an offender, who is reluctant to enter a plea to the criminal charges he faces because he is uncertain whether the regulators will have another go at him and take him off the road for unacceptable conduct. If he has a sporting chance of an acquittal on the criminal charge he may as well chance his arm with the regulator later. But this way the trial judge, who had considered the prosecution's case and the defence's (now hopefully fuller) defence statement, would be able to offer a comprehensive package to the defence: a term of imprisonment, the payment of a specified amount of money to the victims of the fraud and a regulatory penalty – perhaps a limited restriction on his future activities in the financial markets – which the defendant would be able to consider and

maybe be advised to offer pleas in the sure knowledge that the buck, as it were, stops there.

## CONCLUSION

I would like to end by quoting from the Denning Lecture, which the former Solicitor General gave last October, when he said:

*'Ensuring that the UK's financial services sector retains and strengthens its regulation as a clean and fair place to do business is important to the economic well being of this country. It is vital if the UK financial services sector is to retain its competitiveness, flexibility and strength.. This requires ... both strong financial regulation and an effective criminal justice system for dealing with those who break the law.'*

**Rosalind Wright**

*Director, Serious Fraud Office*

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