

**THE INVESTIGATION AND PROSECUTION OF SERIOUS AND COMPLEX FRAUD
TOWARDS THE 21ST CENTURY**

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On 21 May 1998 a jury, reduced to 9, returned verdicts in the Butte Mining case. Three defendants were found guilty; one was acquitted. The trial began on 2nd June 1997 on two counts of conspiracy to defraud. The case had been transferred to the Central Criminal Court on 14 September 1995 and the investigation had commenced in 1993. Although the case was big it was not a mammoth case, involving four defendants, approximately 170 statements from witnesses, admittedly many of whom were abroad. The case was not conceptually difficult. The allegation was that Butte Mining Limited was brought to the stock market in October 1987 on the basis of false listing particulars both then and in 1988. The factual inaccuracies, admissions and mis-statements went to the value of the assets being offered to the public and the supposed profitability of the mine concerned. For this was a mining fraud. About £15 million had been obtained from the public as a result. It was not a monster case but, as I say, it took nearly 11 months to try. The jury were out for a total period of 160 hours over a period of four weeks.

Why do such cases take so long both to try and investigate and what should be done about them?

I come here today very much wanting to learn from you as well as offering you the benefit of my experience both as a prosecutor and regulator. The cases we deal with at the Serious Fraud Office are frequently highly complex, trans-national, with esoteric market backgrounds and where the complexities of commercial transactions, audit trails and market knowledge combine to produce cases of great difficulty and enormous size. It is because the control of and direction of the investigation of such cases should be in the hands of those who will ultimately be responsible for their prosecution that the SFO exists. Although I have powers under Section 2 of the Criminal Justice Act 1987 to require individuals to answer questions, furnish information and provide papers, the task of investigating and then reducing the result of the investigation into something palatable before a jury remains an enormous challenge. How is this challenge met?

As you will be aware the quality of the opposition can be very high. A lot of money is at risk; a lot of money can be earned defending in these cases. There have been challenges to the use of investigating powers and prosecution practices both in the domestic courts and in the European Court of Human Rights. The case of Saunders v. UK where the use of compulsorily acquired interview material was found to have breached Mr Saunders' human rights is a stark example of how we have had to change our approach to investigations. Obtaining evidence from overseas is a particular problem consuming much

time.

We all experience problems when trying to mount a case against a defendant in a serious or complex fraud case on obtaining 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. Like you, 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 and there is still a lack of appreciation, particularly by civil law jurisdictions, of the difficulty that an English prosecutor has of having to present for example computer generated evidence before an English court which requires a certificate under Section 69 of the Police and Criminal Evidence Act, 1984, to certify that the computer was working properly on the day that it generated the evidence, before the evidence itself can be admitted in an English Court and that's an absolute requirement; unless the defence is prepared to agree to the evidence going in, we can't get the judge to take judicial notice. In each case, we have to ask the overseas jurisdiction to provide us with a Section 69 certificate, something that overseas jurisdictions have great intellectual and practical difficulty with. Because of this, we have not been able, in several very major cases, to adduce essential evidence from abroad which was computer generated information because we weren't able to get that Section 69 statement.

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 any power to require somebody to come on pain of imprisonment if they refuse to answer a summons 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 systems do not easily fit together.

However the first hurdle is getting to the witness. The co-operation we receive from most countries is improving; due I am sure to the assistance we are able to offer overseas authorities, using our powers under Section 2, Criminal Justice Act 1987, to obtain evidence for them 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; Switzerland is a particular example. Over the last ten years we have developed a useful working relationship with the Swiss and we understand the pressures that they face but nonetheless in many key cases we have not been able to obtain in the time we need it, key evidence, and particularly, banking evidence, from Switzerland and markedly from Liechtenstein as well.

The Section 69 point is only one example of the way in which the investigation is skewed or delayed in fulfilling evidential requirements which must surely have lost their purpose. Similarly, there is the problem of the charge itself.

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 century, 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 Section 15 of the Theft Act - 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.

Modern commercial activities and the modern methods by which dishonesty may be affected, makes one constantly worry that the structure 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. The Law Commission's Consultation Paper No 155 on offences of dishonesty and deception, published at the end of April, has a number of proposals which are very welcome to prosecutors - in particular, the suggestion that where a fraudulent scheme involves the commission of two or more deception offences, the carrying out of that scheme should be regarded as a single offence.

The present offences of theft and deception are not sufficiently flexible and robust to adapt to modern methods of committing fraud. We can use conspiracy to defraud where the acts are committed by more than one defendant. Where a defendant acts on his own, there is no such general offence. The criminal law should be able to address dishonest conduct, and not be limited by the mechanics by which the fraud was carried out. The SFO has long argued for a single offence of fraud, based on dishonesty on the same basis as a conspiracy to defraud. This would cover cases which are now either not criminal at all, or where the theft or deception laws are strained to encompass the facts - cases such as the dishonest use of undue influence to deprive the old and vulnerable of their savings or obliging them to pay over the odds for services, such as repairs to their property, to which they have agreed in all innocence.

There are concerns about using deception as the sole basis for "fraud"; apart from its restriction to cases where deceit actually played a part. In some cases, it is extremely difficult to show what the operative deceit was on the minds of investors bombarded with numerous false inducements to invest. Normally one would use a conspiracy to defraud charge but what if the defendant acts alone?

The Law Commission recognises the difficulty of deceiving the "mind" of a machine, such as a computer, and suggests this may be addressed later in a further consultation paper on the law of theft. These problems, I suggest, would be adequately covered in a general fraud offence based on dishonesty, where no deceit need necessarily be proved.

The Law Commission rightly draws attention to the impact of the European Convention on Human Rights and whether a general offence of fraud might be too wide to be compatible with it. In other jurisdictions there is such a general offence of fraud, particularly in Canada and New Zealand which have full developed Bills of Rights and this general offence is not considered inimical to their legislation. On the Continent too, there are generally-framed offences of fraud which are not thought to fall foul of the ECHR, so we are not convinced that there is an insuperable difficulty in relation to the ECHR for our suggested general offence of fraud. In addition, if the general offences of conspiracy to defraud and fraudulent trading are not thought to fall foul of the ECHR, why should the substantive offence of "fraud" do so?

At the moment, as far as the trial process is concerned things have not really moved a great deal further forward since the days before Roskill. Roskill advocated preparatory hearings, to streamline the issues, to reach accord on what could be agreed by both sides before the trial properly started: to deal with problems of admissibility of evidence.

Are preparatory hearings working as intended?

The answer has to be, not as well as they should, but they have made great strides. 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 interest 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.

It needs a judge of considerable clout - of experience and ability but above all determination and personality to manage a preparatory hearing 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. It should be remembered that a preparatory hearing is not a pre-trial hearing but a hearing to determine issues in the trial. It requires preparation fought by the Prosecution Defence and the Trial Judge. I also believe that it should be extended to allow the Judge to impose orders allowing evidence to be admitted where it is not seriously in dispute even if the defence to not agree.

Next 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 of a number of charges which will either be samples, if the nature of the criminality is similar in the whole series of transactions, or will simply be part of a story with other parts to follow later in later indictments. The advantage of this approach is obvious - it makes the dish for the jury digestible - but there may be a disadvantage in this tactic - the jury doesn't see the whole picture. The incomplete picture argument is one which leads some to suggest that there are certain complex fraud trials where a jury is not appropriate. The argument goes that if the trial can't be presented before a jury without seeing the whole picture then the trial cannot be conducted before a jury. As a matter of practice it's often difficult for the prosecution to proceed to the second indictment if it's failed on the first. Where the count is a sample count it would be virtually impossible. Where the selection is based on dividing the story up into digestible bites there's often the feeling that the prosecution has proceeded on its best bite first and, certainly, amongst certain judges, there seems to be a widespread feeling that the prosecution only gets one bite at the cherry.

In order to simplify trials we have attempted to find separate areas of cases where different defendants or groups of them can be dealt with, in separate trials, and this ensures that no defendant should face a lengthy trial when he or she is marginally involved. It also goes some way to simplify the issues that each jury has to face. Mr Justice Buckley decided that the proposed second Maxwell trial should not proceed; his reasoning appears to be that as the jury acquitted in the first trial, the Crown should accept that verdict and discontinue any subsequent trial. If Maxwell is 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 short and simple for the jury.

Trial Management

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 numbers 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.

The SFO is addressing the problems of an excess of paper. We are presently trialling a new document management and control system for use in investigations and for presentation of evidence in court, called DOCMAN. It stands for Document Management System and will scan in all the documentation that we get in the course of an investigation so that every piece of paper scanned into the system will be available for the defence, the judge and counsel on a CD Rom. The same will apply to unused materials, this is the great bundle in there that we have to disclose all unused material that is relevant to the case and all that will be available, indexed and accessible very quickly and much more easily than it was on paper and of course not take up huge amounts of acreage of space in the court and that in itself will save an enormous amount of time, space and temper.

But the concept of manageability is not limited to just the paper; the crucial element here is a judge who can impose strict and firm control on the way the case is run in the court. Fraud trial judges are the essential linchpin of a successful case. The ideal is 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, you have the essential element for the success of a case. If the trial judge has all those elements, then you will have an efficiently, effectively and economically run case. Without them, the trial will bogged down into a morass of contradictory facts and in the end not only are the jury none the wiser but submissions and arguments of prosecuting and defence counsel will get ever more prolix and more incomprehensible.

So we need judges who are trained in trial management procedures and who want to deal with these cases. Most judges are most reluctant to try fraud cases. This is a great pity, as some High Court Judges normally sit in the commercial court would be ideally suited to try our cases and are perhaps not encouraged as they might be, to do so. The Lord Chancellor's Department is carrying out a review of trial management in serious and complex fraud cases in which we hope we will be able to make a constructive contribution.

The LCD is to make efforts to concentrate big fraud trials in specific fraud trial centres (about 6 in all) which have sufficiently large court rooms to handle the present weight of paper that I mentioned, with plenty of ancillary rooms so that defendants have adequate room to prepare their cases and consult their representatives and are equipped to handle the IT and teleconferencing technology. If a judge is not attached to one of those large fraud trial centres, then he or she may never get the chance to try one of these cases. Commercial judges who you might think would be very appropriate to deal with these cases are very unlikely to get the chance to try these cases too.

The Home Office decision on the outcome of the consultation process on the alternatives to jury trial in serious and complex fraud cases is still awaited. For my part, I think 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, we are seeing too many acquittals of defendants. 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 which I as the prosecutor or the judge or counsel or

anybody else agrees or disagrees with 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.

The real problem is that a small number of cases as I have said are so large and complex that, as I've indicated, they can't be dealt with in one trial. I've already mentioned the problem of severing indictments so that the jury don't see the full picture or you split the case into two and you're not allowed to do the second case. The damage in consequence for the criminal justice system is that allegations of serious dishonest conduct committed over a lengthy period become untriable. We are forced to restrict our evidence in a totally artificial and unrealistic way.

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.

The Home Office issued a consultation paper a year ago, 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 lay man 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.

So my preference would be for a financially or commercially-aware lay member, somebody with a banking background, somebody with accountancy background, somebody with stockbroking 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 alternate 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. I think you must regard these cases as exceptional. I'm very worried about the 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 very familiar to the more senior members of my audience today - that this is a system of chaps letting off 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 gun point of say £10 goes to prison for 15 years and it doesn't happen to the suits. Whatever system we put in place it must command public confidence.

The Regulatory Role in Fraud

When does the regulator take over conduct of these complex cases and take them out of the criminal arena? We have for several years, worked to a protocol agreed with the then Securities and Investments Board (now the FSA) to determine, in cases where there is an overlap between the criminal and the regulatory functions, 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.

In summary the guidelines provide -

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Tending towards priority to regulatory action

Offence is technical or in a grey area

Where regulatory penalties seem sufficiently severe and are publicly known

Where urgent action is needed and best taken by the regulator

No notice of personal gain demonstrated

Where regulator more likely to succeed

Where predominant issue relates to protection of markets rather than to serious dishonesty as such

Where all the potential defendants and victims are within the jurisdiction of the regulator

Where there are areas which are best investigated using regulatory expertise

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Tending towards priority to prosecution

Some dishonesty on part of potential defendants

High level of public concern in punishment

Where urgent action is needed and best taken by the prosecutor

Where case falls only partly within regulated area and prospects of splitting enquiry are not good

Where nature of offence requires strong criminal deterrence

Where power of arrest or detention critical

Where the defendant is not willing to co-operate with the regulator or the regulator's powers or jurisdiction seem unlikely to be adequate

One Stop Shopping

To make criminal trials for fraud more effective, from the regulatory as well as the criminal points of view, may I make this suggestion: What about giving criminal judges 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 can do now, under Section 59 of the Financial Services Act- 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? I am certain that if you carried out a survey of those who had been defrauded, you would find that the concern of the majority would be to recover the monies they had been defrauded of, rather than to see, perhaps years later, a by now impecunious defendant (all "his" - or rather, their - funds long since spent, salted away, or spent on his defence) receive a few years imprisonment.

I have referred to this combined approach, not very originally, as "one stop shopping". It seems to me that an enormous duplication of effort goes into the criminal investigation and trial of an offender, who is reluctant to offer 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 specific 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 may be advised to offer pleas in the sure knowledge that the buck, as it were, stops there.

In a speech some time ago, the Lord Chancellor floated a more sophisticated and radical strategy for dealing with the multiplicity of investigatory and enforcement possibilities available within the criminal justice and the regulatory systems; he proposed a trial process whereby a panel of regulatory assessors would "shadow" the judge and jury hearing evidence at a criminal trial and then adjudicate on regulatory issues at the end of the process. There are any number of refinements and permutations that one could devise to speed up and streamline the process of trying and punishing complex financial crime. The essential element must be that it works and that the public has confidence in it.

Let us finally return to Roskill. He noted in his report -

"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 trials by jury for this type of case."

Whatever happens with juries; whatever happens with regulation we must ensure that the cases we bring to court are capable of being disposed of in a reasonable timescale by a reasonable tribunal. That can only happen if we are assisted with rules of evidence, procedure and substantive offences which are appropriate and which command public confidence.