

FRAUD BULLETIN

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9 GOUGH SQUARE

Sentencing Guidelines or Tramlines?



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On 13th October 2009 the Sentencing Guidelines Council issued the Definitive Guideline 'Sentencing for Fraud – Statutory Offences'. As the title implies the common law offences of conspiracy to defraud and cheating the revenue have not been included. The Guidelines expressly state in relation to those common law offences that "Judges should continue to refer to existing guidance from the Court of Appeal (Criminal Division) when sentencing for those offences". However, as there is a specific section of the Guidelines for revenue fraud it seems likely that they will become, at the very least, a starting point for offences of cheating the revenue.

Those familiar with other Definitive Guidelines will see the normal formulaic approach. Indeed more so than usual as the value of the fraud allows for a multiplicity of grids setting out the appropriate sentencing ranges and starting points. No article can really do justice to these Guidelines without setting them out in full and there is no substitute for reading them. They are a 'must have item' for any fraud practitioner. Copies can be downloaded from www.sentencing-guidelines.gov.uk

The Guidelines set out five categories of fraud:

1. Confidence fraud
2. Possessing, making or supplying articles for use in fraud
3. Banking and insurance fraud and obtaining credit through fraud
4. Benefit fraud
5. Revenue fraud (against HM Revenue and Customs)

It is therefore necessary to look at the type of fraud committed rather than the specific offence for which a defendant has been convicted. This is a sensible strategy for the Sentencing Guidelines Council to have taken bearing in mind that the Fraud Act 2006 was deliberately drafted in a broad way to encompass a wide range of behaviour for each of the offences.

The Guidelines set out four factors that are

particularly relevant to offending behaviour in fraud cases. They are:

- a. The number of individuals involved and the role of the offender
- b. Whether the offending was carried out over a significant period of time?
- c. The use of another person's identity
- d. Whether the offence has a lasting effect on the victim?

In relation to mitigating factors three matters are identified as being particularly relevant. They are:

- a. Peripheral involvement
- b. Behaviour not fraudulent from outset
- c. Offender being given misleading or incomplete advice

As far as personal mitigation is concerned the Guidelines identify four factors. They are:

- a. Voluntary cessation of offending
- b. Complete and unprompted disclosure of the fraud
- c. Voluntary restitution
- d. Financial pressure

When considering the Guidelines it is important to note paragraph 8 which states: "The approach to sentencing, starting points and ranges has taken account of the other sanctions and ancillary orders likely to be applied which may have a

significant impact on an offender". Accordingly it would appear that very little or no weight can be put on the fact that compensation orders and/or confiscation orders and/or serious crime prevention orders will be made when mitigating on the appropriate level of sentence.

With the exception of the Guidelines for possessing articles for use in fraud all of the other Guidelines are driven by the value and the nature of the fraud. In relation to the value the following brackets are used:

- £500,000 or more
- £100,000 or more but less than £500,000
- £20,000 or more but less than £100,000
- Less than £20,000

The Guidelines also rely heavily on following common sense distinctions of decreasing levels of seriousness:

- Fraudulent from the outset, professionally planned and either fraud carried out over a significant period of time or multiple frauds
- Fraudulent from the outset and either fraud carried out over a significant period of time or multiple frauds
- Not fraudulent from the outset and either fraud carried out over a significant period of time or multiple frauds
- Single fraudulent transaction, fraudulent from the outset
- Single fraudulent transaction, not fraudulent from the outset

In the past judicial attitudes to sentencing fraud cases have varied widely particularly as those cases often involve significant and powerful mitigation. These new formulaic Guidelines will certainly restrict judicial discretion but whether they will bring consistency and amount to Tramlines rather than Guidelines we will have to wait and see.

To negotiate or not?

The Problem

The Serious Fraud Office (“SFO”) is thought to have been under pressure in recent years because it has not been performing well. Cases seem to take a long time to come to trial. Worse still, the general feeling is that its conviction rates are too low. In 2008/9 its conviction rate was 60%. In 2007/8 its conviction rate was 68%. In the previous five years, 2002/7, the conviction rate was 61%.

Meanwhile New York prosecutor Jessica de Grazzia was instructed to consider the work of the SFO, particularly by comparison to similar work done in New York. She contrasted the 2002/7 figures with those of the equivalent New York prosecutors. For the same five-year period the Manhattan District Attorney’s Office Fraud Bureau (“DANY”) achieved a conviction rate of 92% and the three comparable units of the federal US Attorney’s office for the Southern District of New York (“SDNY”) managed 96.5%.

Part of the explanation for these high figures is a much higher rate of guilty pleas. Of all of the convictions obtained by DANY 94% were gained by guilty pleas. As Ms de Grazzia explained

“Once indicted, the odds of conviction are so high that defendants are, in the main, willing to plead guilty at an early stage of the process in exchange for a reduced sentence which the judge indicates to the defence in advance of plea.”

If a recently charged defendant in the UK is advised that statistically he has a four-in-ten chance of being acquitted, it is not surprising that he is likely to “take his chance”, particularly if his life would be ruined by any conviction and if there is no procedure for limiting by agreement the quantum of confiscation. His lawyers have little incentive to persuade him otherwise.

What can the SFO do about this situation? First, it can constantly strive to improve the focus of its investigations. Secondly, it can take steps to avoid losing cases before a jury is sworn. Of the 32 defendants acquitted in SFO cases in the last two years a maximum of 10 were acquitted after a jury had been sworn. 19 were acquitted after adverse rulings by the judge and three benefited from a prosecution decision to offer no evidence after co-defendants pleaded guilty. If these 22 “technical knockouts” are excluded, the SFO conviction rate in 2007/8 was 100% and in 2008/9 it was 78%.

If this problem can be diminished, the number of guilty pleas should be increased. The Court of

Appeal has stated very clearly that trial judges should not stay prosecutions where the trial process can adequately deal with the relevant grievance. Prosecutors will not succeed in minimising stays of prosecution unless they can deal effectively with the problem of Disclosure (*which is another story*).

The Solution

There is another step that might be taken which has the potential, not only to increase the number of guilty pleas but also to secure such pleas at an earlier stage in the proceedings. The Fraud Review sent out to consultation in 2007 and finally published in 2008 examined the plea negotiation process operated by SDNY and concluded that “a plea-bargaining system can incorporate the non-negotiable principles of fairness to defendants, judicial independence and safeguarding the public interest by means of checks and balances.” Most of those responding to the Fraud Review consultation process supported the proposal.

The Attorney-General issued a consultation paper to which the Criminal Bar Association (“CBA”) responded and then, on 18th March 2009 she issued “Guidelines on Plea Discussions in Cases of Serious or Complex Fraud”. These specific Guidelines were published against the background of and specifically reaffirm the earlier Attorney-General’s Guidelines on the Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Process issued in October 2005 (“the Code”) and also the Acceptance of Pleas Guidelines, the Prosecutor’s Pledge, the Victim’s Charter and the Code of Practice for the Victims of Crime.

The Plea Discussions Guidelines came into effect on 5th May 2009 and apply to allegations of serious and complex fraud. Fraud may be serious and complex if at least two of the following factors are present (my summary):

- The amount obtained or intended to be obtained is alleged to have exceeded £500,000.
- There is a significant international dimension.

- The case requires specialized knowledge of financial, commercial, fiscal or regulatory matters.
- There are allegations of fraud against numerous victims.
- There is substantial fraud on a public body.
- The case is likely to cause substantial public concern.
- The alleged misconduct endangered the economic well-being of the United Kingdom.

The Guidelines make it clear that they do not prevent or discourage existing practices whereby cases are discussed between prosecution and defence after charge to narrow the issues or prepare a basis of plea. The Goodyear procedure (*whereby a judge in the Crown Court may give an indication as to sentence in advance of plea*) is unaffected.

The Guidelines include some relatively bland statements of general principle which include that the prosecutor must act openly, fairly and in the interests of justice. More specifically, the prosecutor must:

- Keep a record of all discussions (a safeguard recommended by the CBA).
- Ensure that the defendant is adequately informed.
- Communicate with the victim wherever it is practicable to do so. This might present quite a logistical problem in a case with numerous victims.
- Ensure that any agreement placed before the court fully and fairly reflects the matters agreed. The prosecutor must not agree matters with a defendant which are not reflected in the written agreement and placed before the court.

Perhaps as a result of a timely warning by the CBA the Guidelines stipulate that the prosecutor cannot initiate the procedure unless the defendant is legally represented. The Criminal Defence Service (Provisional Representation Orders) Regulations 2009 give the Legal Services Commission discretion to grant a provisional right to publicly funded representation in cases of serious fraud. This experiment will expire on 31st December 2011.

Provided the defendant is represented the prosecutor, if he or she thinks it advantageous to do so, may send him a letter inviting him to enter

plea discussions. If the defendant agrees, the prosecutor has to send him a second letter setting out the terms and conditions of the proposed discussion. Various provisions are made as to what those terms and conditions should be. They include that both sides shall make undertakings as to confidentiality. The prosecutor's undertaking shall be qualified by saying that he will make such disclosure as may be required by law which may include giving disclosure about the discussions to a co-defendant. The prosecutor should also make it clear that any concluded and signed agreement may, if appropriate, be placed in evidence by the prosecution.

Once agreement to the terms and conditions has been reached, the plea discussions can begin. If the proceedings have not yet started or if the prosecution has not yet served a statement of the evidence or a case statement, the prosecution will for the purpose of the discussions serve on the defendant a written statement of the prosecution case including a list of the actual or proposed charges. The discussions may be conducted in correspondence or face to face or a combination of the two. Either way a full written record must be kept of every key action and event in the discussion process.

If the defendant at any stage offers to give evidence or information about the activities of others, this should be dealt with in accordance with sections 71 to 74 of the Serious Organised Crime and Police Act 2005, the judgement of the Court of Appeal in Blackburn [2007] EWCA Crim 2290 and other specified guidance. The prosecutor should liaise with any other prosecutor or regulatory authority (in England and Wales or elsewhere) who may have an interest.

During the course of the discussion the parties should resolve any factual issues necessary to allow the court to sentence the defendant on a clear, fair and accurate basis. Having agreed upon the pleas and a factual basis the parties should agree the range of sentence including ancillary orders such as compensation and disqualification from being a director. So far as confiscation is concerned "it is open to the prosecutor to take a realistic view of the likely approach of the court to the determination of any points in dispute." This seems to be a gloss on the position under the Proceeds of Crime Act 2002 which gives no discretion to the prosecution or the court to compromise issues affecting compensation.

All matters agreed between the parties should be reduced to writing and signed by both parties. If proceedings have not already been started the prosecutor will bring proceedings by charge or summons. In advance of the first hearing in the

Crown Court the prosecutor should send to the court "sufficient material to allow the judge to understand the facts of the case and the history of plea discussions, to assess whether the plea agreement is fair and in the interests of justice, and to decide the appropriate sentence". This requirement was another recommendation of the CBA. The bundle must include:

- *The signed plea agreement;*
- *A joint statement as to sentence and sentencing considerations;*
- *Any relevant sentencing guidelines or authorities;*
- *All of the material provided by the prosecution to the defendant in the course of the plea discussions;*
- *Any material provided by the defendant to the prosecution, such as documents relating to personal mitigation; and*
- *The minutes of any meetings between the parties and any correspondence generated in the plea discussions.*

"It will then be for the court to decide how to deal with the plea agreement. In particular, the court retains an absolute discretion as to whether or not it sentences in accordance with the joint submission from the parties."

The Guidelines specifically state that the defendant may decline to plead guilty in accordance with the plea agreement, either as a result of a sentence indication given under the procedure set out in R v Goodyear or for some other reason.

Since the prosecution can put a signed agreement into evidence as a confession, it would seem that a defendant wishing to preserve his position for a Goodyear indication should make this entirely clear during the discussions.

How real are the advantages?

Clearly, it is in the interests of justice and of the public purse if guilty persons plead guilty at an early stage. The likelihood of a significant number of people pleading guilty as a result of this reform would seem to depend upon how judges deal with these cases. How much might the discount on sentence be? Currently the theoretical maximum discount for pleading at the earliest opportunity is 30%. If one defendant is offered plea negotiations and another defendant in the same case is not and they both plead guilty on their first appearance in court, could either be denied a 30% discount? If not, other incentives would be required to persuade a defendant to enter early plea negotiations. R v Lawrence (1983) 5 Cr App(S) 220 seems to indicate that concurrent sentences might be passed for offences outside the scope of the investigation

that have only come to light by the unprompted confession of the accused. This might provide a real incentive for a defendant who is being investigated for a limited part of his overall criminality.

Might a greater than 30% discount be available for a hyper-early plea? One problem with this suggestion might be the need to reconcile the tariff for a hyper-early plea with the tariff for a defendant who provides information or gives evidence for the prosecution (See section 73 of SOCPA, Lawrence and pre-SOCPA authorities).

Alternatively, could a greater incentive be found if prosecutors and judges in turn were willing to countenance favourable compromises of confiscation?

Potential Risks

The first risk to the defendant is that, if negotiations fail, co-defendants and the prosecution might make use of information divulged.

The main risk to the public is quite different. There is a long history in the courts of England and Wales of concern that innocent defendants might plead guilty if the incentive to do so were too strong (see, for example, Turner [1970] 2 QB 321). The amount of pressure on a defendant will largely depend on the extent of the difference between the likely sentence after a fight and after an (early) plea. British observers have been quick to condemn from a distance the US sentencing practice, which is said to confront defendants with a choice between sentences after a fight which are well in excess of UK tariffs and those after an early plea that are comparatively modest. Ms de Grazia and other commentators who have actual experience of American jurisdictions state that the extremes are not so far apart. Whether these reforms are a dangerous step too far in giving incentives to defendants to plead guilty will be a matter for individual assessment once the practice of judges emerges.



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Overseas Corruption is a new picture emerging?

In July the Serious Fraud Office ("SFO") published new Guidelines for self-reporting by companies of breaches of UK Corruption laws. This follows the publication of the draft Bribery Bill which remains due before Parliament, though unlikely to be proffered in this session.

While the UK has been roundly criticised by the OECD and international partners for failing to live up to Treaty commitments in respect of clamping down on corruption of overseas government officials, the SFO has been making steady, if unspectacular progress in this area. First the civil settlement with Balfour Beatty, then the recent conviction of bridge builders, Mabey & Johnson Limited are cases in point, though this last case raises other issues.

The new Guidelines were meant to be a step forward in providing much needed transparency for UK companies in making decisions to self report. Certainly there was much comment on the efficacy of self reporting but little or no consideration has been given to evaluating the consequences of doing so.

Unfortunately the Guidelines fail to provide any measure of certainty, except to guarantee that anyone self reporting will be subject to either civil or criminal sanctions. The prospect of no action being taken against a self reportee is not really canvassed though the retention of discretion in the decision making process of the SFO must always admit of such a course being open to them, even if it is not clear when they may take it.

While the SFO no doubt hope that by promoting self reporting much of the work involved will be undertaken for them and will guarantee a 'result' in circumstances where such is by no means usually certain; the carrot of offering the 'soft' option of a civil remedy as opposed to the full force of the criminal law is tempered by the fact that – unlike in the USA – a company who has been making real strides to avoid corruption and is caught unawares is unlikely to escape enforcement action if they self report.

What is more there are no guarantees that action will not be taken against individuals even

if the SFO decide the civil route is appropriate for the company. Given that the SFO has had a significant amount of bad press recently, it might be thought that self reporting to an agency in serious need of some results may not be the smart option.

The experience of Mabey & Johnson is informative. The case reports all make it clear that Mabey & Johnson self reported, which – according to the SFO's own (then) recently published Guidance – should have resulted in a civil process but they actually ended up at Southwark Crown Court pleading guilty to criminal charges. The reasons for this departure from their own, brand new, Guidelines have not been made public but it can hardly be regarded as a ringing endorsement of those who embrace the self reporting ethos.

Further there is no ability to assess whether either an investigation or a criminal prosecution against Mabey & Johnson would ever have been attempted had they not self reported. When one considers that in the Balfour Beatty matter the SFO investigated with a view to a criminal prosecution for some time before agreeing to resolve the matter with a Civil Recovery Order, it is more surprising that no comment has been made regarding the prosecution decision in Mabey & Johnson.

Whilst little has been made of this disparity in the media reports, there is another issue which deserves some consideration. Unfortunately a lack of available information makes a proper consideration impossible but it does allow some issues to be raised. In both the Balfour Beatty and Mabey & Johnson cases, the companies have agreed to the appointment of a monitor. In the Balfour Beatty case, under the civil process, there is a clear mechanism for enforcement of the monitor arrangements as it is part of the settlement agreement and, accordingly, is likely to be open to control by the court.

In the Mabey & Johnson case, the criminal process is much less clear on the enforceability of the monitor arrangements. The fines and other financial orders are all subject to court control by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 but once these are satisfied the Act provides for no mechanism for enforcement of the monitorship agreement. The 'plea agreement' entered into by the SFO and Mabey & Johnson is unlikely to have greater effect in criminal law than a basis of plea for the purposes of sentencing. Whether the plea agreement is stated to have effect between the parties for the purposes of enforcement by the civil courts, the ability to enforce it through the civil courts must be doubtful because it was expressly entered into as part of the criminal proceedings.

The SFO have apparently closely followed US documentation in respect of the plea agreement and the related ancillary documentation, including the monitor appointment but the legal systems are not so alike that as clear a result necessarily follows. The US system permits of such agreements and gives the court specific authority to oversee their enforcement. In the UK, no such arrangement subsists within the statutory framework affecting the operation of our criminal courts.

While there is no reason to suppose that Mabey & Johnson would ever consider failing to comply with the monitor appointed by them and approved by the SFO, the enforceability of the arrangement must remain open to debate.



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