The Serious Fraud Office's Perspective on Sentence Canvassing

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The Serious Fraud Office is a specialist organisation with responsibility for the investigation and prosecution of some of the biggest frauds in the UK.

In a fast changing criminal justice system, the SFO has to be adaptable, contribute to change and, where possible, help to set the course of that change. The development of innovative approaches to investigation and prosecution outcomes is an area where the SFO has a strong interest. To understand that interest it is necessary to know something about the work of the SFO.

SFO Backdrop

The SFO deals with a comparatively small number of cases, although the cases themselves are large and complex. They are very expensive to investigate and, once a decision to charge has been made, they are very expensive to get trial ready. In the event of a not-guilty plea the trials are very expensive to run. This is just from the prosecution perspective – it is also very expensive for the defence and in many cases defence costs are publicly funded.

Over the past five years, from 2001-2005, there have been only 82 SFO trials involving 192 defendants of whom 135 were convicted, producing a conviction rate of 70% - a good rate but one which, at the moment, is falling year on year.

Although the case load varies, the number of trials is increasing each year. For example in 2004 - 2005 there were 20 trials involving 58 defendants, of whom 37 were convicted (14 by jury verdict, 23 pleaded guilty). Of those convicted 32 received custodial sentences. The longest term of imprisonment was 7 years.

The defendants were almost invariably charged with "offences of dishonestly". Where a full trial was held, there was little real dispute as to the facts of what had

occurred. The area of dispute between prosecution and defence was whether a defendant acted dishonestly.

The current law

Routes for mediated settlements do not sit easily within an adversarial criminal process which requires the prosecution to prove the case beyond reasonable doubt. This is particularly so as the working of the adversarial system may engender distrust between the prosecution and defence.

Under current UK law there is no overt route for “the settlement” of a criminal case to be mediated or negotiated. There cannot, for example, be pre-trial discussions between parties where a defendant can make admissions without these counting against him.

Although the Criminal Procedure Rules allow the trial judge who, in most cases, has had charge of the case for many months or even years, to rule in a way that may finalise proceedings, this is not a mediation or negotiation and frequently does not involve a satisfactory outcome from the prosecution perspective. For example the pressure to keep trials as short as possible commonly results in severance of charges and/or defendants in a way that does not allow the case to be presented to court in a coherent and cohesive way. If there are convictions on Trial 1 it is often not in the public interest to proceed with Trial 2. Consequently severed defendants may escape justice completely.

Limited post-charge plea bargaining, where a prosecutor agrees to drop certain charges or proceed on a lesser one in exchange for pleas of guilty on other charges, can only be undertaken within strict guidelines set out by the Attorney General. “The bargain” cannot involve an arrangement where the full facts are not known to the court. And above all, a defendant’s plea must be voluntary and made without improper pressure.

Similarly there are limited circumstances, following the Court of Appeal judgment in *R v Goodyear* [2005], which allow sentence canvassing to be undertaken by the defence whereby, before a plea is entered, a judge may indicate the sentence that would be imposed on particular facts. Although the trial judge may raise the possibility of sentence canvassing with the defence, the process of sentence canvassing must not put pressure on a defendant to plead guilty.

From the SFO perspective the *Goodyear* judgment is a welcome development, but it is unlikely to make a great impact – many our defendants prefer to take their chances before a jury.

Factors currently affecting use of sentence canvassing

"Chance" is a factor that deserves more of a mention. There are other factors that inhibit sentence canvassing being used more widely, many of which are rooted in the psychology of SFO defendants.

The average SFO defendant is a business person who has frequently been involved in the running of what appears to be a successful business. They are used to doing deals but they are also very adept at weighing odds and the current criminal process provides too many "wild cards". One "wild card" has already been mentioned; severance of charges which might put a defendant into Trial 2 and Trial 2 may never happen.

Another "wild card" is that even the largest fraud trial is still heard before a jury. The SFO's view is not that a jury is incapable of understanding our cases. We work hard at presenting evidence in a way that allows a clear perspective on the case, using electronic presentation of evidence and sophisticated graphics. However the longer a case is, the more strain there is on a jury. By the end of a recent eight month trial two jurors had been discharged and third juror was so ill that there was a two week delay before the jury retired to consider their verdict. In this case the jury of 10 eventually convicted but the loss of another juror could

have led to a retrial, with the linked public interest assessment of whether the retrial should go ahead – another element of chance.

An additional factor is the low sentences for fraud offences, which is further aggravated by an additional 30% reduction for an early guilty plea. SFO is currently appealing a sentence of a conditional discharge for money laundering £280,000 as unduly lenient. Even if the appeal succeeds, the wrong message has been sent.

These are just some of the factors that, whatever the weight of evidence against them, encourage defendants to take their chances with a full trial.

The SFO and Sentence Canvassing

The SFO has long supported a more specialist system of sentence canvassing as a means of delivering resource benefits by:

- Encouraging defendants who would otherwise have been convicted following a contested trial to plead guilty at an early stage; and
- Reducing the number of "cracked trials", where at the doors of the trial court, a defendant changes a plea to guilty.

The key points put forward by the SFO in support of such a system are:

1. A defendant who is in fact guilty should be able to plead guilty and be dealt with as early as possible;
2. When prosecutors or regulators have sufficient information to assess the extent of a fraud or a participant's involvement in a fraud, it is not normally in the public interest to continue to gather information or put that information into evidential form, if the participant wishes to plead guilty to an acceptable criminal charge and/or submit to an acceptable regulatory penalty and/or compensate losers.
3. The present system, even taking into account a discount for a guilty plea, requires a defendant to "take a leap in the dark" as to actual sentence.

For many years the SFO has been looking at how this can be achieved. For example, in 1995 the SFO worked on developing a statutory framework for a system of sentence canvassing which took into account the availability of regulatory sanctions.

These proposals foundered as there were too many reservations:

- A specialty fraud sentencing canvassing procedure would risk accusation of there being “one law for the rich”.
- A more complex system that took account of regulatory penalties would inevitably involve an element of negotiation, as it would involve the defendant’s co-operation. It would make the defendant an active participant in a way that might invite criticism on a number of grounds, but most obviously that “white collar criminals” were being treated more favourably than others who committed less serious property/financial offences.

The key question is whether any factors have changed in the assessment of whether an alternative and specialist disposal route for certain serious and complex frauds is appropriate. In my view there have been changes.

In recent years the role of regulators has increased, together with a corresponding increase in their powers. The SFO is regularly involved with a number of regulators, for example the Financial Services Agency, the Bank of England.

The SFO has Memoranda of Understanding with a number of regulators which:

- acknowledge common interests and areas of responsibility;
- seek to ensure that overlapping powers are operated effectively;
- encourage co-operation between investigators and prosecutors across organisations wherever appropriate.

Another key change is a recognition that there has to be a way in which the processes of the criminal law can accommodate long and complex cases more effectively, not just in terms of " the interests of justice" but also on a "value for money" approach.

Specialist Fraud Sentence Canvassing.

Against this background support for a specialist form of sentence canvassing in serious fraud cases, bringing together all agencies in a particular case with investigation/regularity responsibilities is growing. The process would be limited to cases where the extent of an individual's wrongdoing was known and where that individual was prepared to admit guilt at an early stage of an investigation. Defence co-operation and involvement would therefore be essential.

Key benefits for regulators and prosecutors [and those that fund them] would be:

- A shorter investigation, with consequent cost savings;
- The avoidance of a full trial, with consequent cost savings;
- Early resolution of investigations that would free resources for other work.

From the defence perspective it could provide:

- Early resolution of proceedings that would reduce the considerable strain that a potential defendant may suffer as a result of the length of time [several years] that it can take to investigate and prosecute serious fraud;
- A sentencing "package" of all criminal and regulatory sanctions, which would provide certainty of outcome.

Judicial involvement

In order to be able to offer both the prosecution and the defence a "judicial seal" on the sentencing outcome in cases where the prosecution route, rather than the regulatory route, was deemed suitable, there would need to be a procedure that would allow early access to a judge.

On the basis of facts agreed by the defence and the prosecution, the judge could indicate what the sentence would be if the defendant pleaded guilty. That sentence indication would cover all aspects including confiscation, compensation, disqualification, and other appropriate penalties.

Application of the proposed scheme

Such specialist sentence canvassing procedure might only be suitable for a small number of cases each year. It would not, for example, be suitable where:

- The defendant did not admit any wrongdoing, or the extent of the wrongdoing;
- The defendant was unrepresented or “vulnerable” in another way;
- The defendant and/or the defendant’s legal representative did not co-operate with the process.

There are also other considerations that would need to be taken into account when developing such a procedure, including:

1. How the parameters of such a scheme should be defined, for example whether the scheme would be available where there were identifiable victims who had suffered considerable financial loss;
2. Whether the procedure would be appropriate where a number of co-defendants were involved;
3. How the procedure could be structured to be compliant with the European Convention of Human Rights.
4. The role of the defence as “negotiators” within the process.

Conclusion

Such a system, or a version of it, would not be appropriate in many cases, maybe only three or four a year. But it would free up SFO resources for more investigations. It would also provide a fairer system with fewer wild cards.

The breaking news is that specialist sentencing canvassing may be an idea whose time has come**.** The Fraud Advisory Panel, an influential independent advisory body has recently recommended that a type of pre-charge plea bargaining should be adopted which could have a dramatic effect upon the investigation and prosecution of serious fraud cases in England and Wales.

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