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## An Examination of Fraud in The UK

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### ABSTRACT

This work explores the concept of serious fraud in England, Wales and Northern Ireland. It will explain the concept of fraud with the emphasis being on the fraud which is economic crime of white-collar crime, that is, financial fraud.

It will look at how the UK combats serious frauds, what treaty mechanisms are used and whether the UK derogates human rights in fighting fraud. It will explain how bribery and corruption on an international level is treated in law, this being especially important in the present climate of terrorism.

It concludes by recommending an immediate review of the lengthy delays in fraud trials which contravenes Article 6 of the European convention on Human Rights and a curb on the indiscriminate use of section 2 powers.

### The Concept of Serious Fraud

Fraud is defined in the Oxford Dictionary as "the quality of being deceitful; criminal deception; the using of false representations to obtain an unjust advantage or to injure the rights or interests of another; a dishonest trick".

English law does not provide a definition of fraud, nor is there a substantive offence of fraud at criminal law. At common law fraud consists of "a false statement of fact which is made by one party to a transaction to the other knowingly, or without belief in its truth or recklessly without caring whether it be true or false, with the intent that it should be acted upon by the other party and which was in fact acted upon".

In a recent case, the judge said "It is notoriously difficult to provide an exhaustive statement as to what is involved in the concepts of 'fraud' and 'intent to defraud'".

'Fraud' involves the notion of detrimentally affecting or risking the property of others, their rights or interests in property, or an opportunity or advantage which the law accords them with respect to property. Conversely it is not fraud to detrimentally affect or risk something in or in relation to which others have no right or interest or in respect of which the law accords them no opportunity or advantage. Fraud is perceived by some as criminal and unethical behaviour and the term 'white-collar crime' is often used as an alternative to the word fraud. It is sometimes classed as crimes of the rich, sometimes as organised crime, or crime of an organised and pre-meditated behaviour, whilst others might view those same as the problems which arise when a business created for an honest purpose, is turned into a criminal one. All this suggests that there is no single wide field of white-collar crime or economic crime or business crime but that the word "fraud" gives a rough imagery rather than a fixed definition of this type of activity.

### Examples of fraud

Examples of the most common offences that are classed as fraud are as follows:

1. Business activity whereby fictitious dividends are declared in order to attract personal savings; operations which favour the board of directors at the expense of social interests and of creditors; fraud relating to subsidies.
2. Payment by invalid cheques without funds.
3. The formation of companies as a means of tax evasion.
4. Fraudulent or culpable bankruptcies.

### Some Case-law

A look at the case-law shows that in the case of *R v Cushion*, Justice Williams said that fraud really means no more than dishonesty. This upholds the broad meaning of fraud consisting of the two elements of dishonesty and deprivation but not deceit as was given in the case *Scott v Metropolitan Police Commissioner*. Yet the element of deceit, though not included in the *Scott* case, was classed as an element of fraud in the case *R v Theroux* when Justice McLachlin said, 'To establish the actus reus of fraud, the Crown must establish beyond a reasonable doubt that the accused practised deceit, lied, or committed some other fraudulent act. .. It will be necessary to show that the act is one which a reasonable person would see as dishonest. Deprivation or the risk of deprivation must then be shown to have occurred as a matter of fact. To establish the mens rea of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and that the accused was aware that deprivation could result from such conduct.' In the case of *R v Zlatie* it was held that non-disclosure can constitute fraud if the non-disclosure would be viewed by a reasonable person as dishonest. Case-law supports criminal sanction of fraud when it means :- to deprive by deceit or to dishonestly deprive, negligent misrepresentation which puts the property of others at risk, and false representation to obtain an unjust advantage.

Today, the criminal law test used in fraud cases is the test for dishonesty and is the decision of the Court of Appeal in *R v Ghosh*(1982). It has two strands, those being that the defendant's actions must not only be dishonest by the ordinary standards of reasonable and honest people, but that he must also have realised that his actions were dishonest according to those standards.

### No law reports on SFO trials

It is to be noted that there are no law reports on any of the Serious Fraud Office's trials. This is because, since the Serious Fraud Office was formed in 1987, no trials have resulted in appeals, except recently when one case was appealed on the length of the sentence given but the appeal was lost.

### Fraud is not classed as an offence by statute

English courts still have not ventured to lay down precisely what constitutes fraud.. The Roskill Report in 1984 which recommended the formation of the Serious Fraud Office, did not consider the offence of fraud but identified on a descriptive basis many fraud offences which the Home Office still uses today. In April 1998 the Home Secretary asked the Law Commission, as part of their programme of work on dishonesty, to consider the law of fraud and whether a general offence of fraud would improve the criminal law. The Law Commission published a consultation paper 'Legislating the Criminal Code: Fraud and Deception' as a result and came down against a general fraud offence. In 2002 the Law Commission again looked at the possibility of a fraud offence and a consultation paper was put to the public in May 2004. It remains to be seen whether the UK implements a fraud offence.

### Studies done on the subject of fraud

Clinard and Yeager (1980) called it organisational crime and Farrell and Swigert (1985) studied the complex organisations in which such crimes are committed. Such organisations usually have high reputations and the crime of serious fraud is perpetrated as an

ongoing illegal activity as explained by Sutherland . Such corporations are organised around a common goal to achieve profit and adopt a structure that is the most efficient and rational means of maximising this goal.

Fraud as an offence as stipulated by the Home Office

Although there is no statutory offence of fraud in the United Kingdom, the Home Office sets out the offences that it considers are offences of fraud in

'Counting Rules for Recording Crime', a Home Office Publication in April 2003 , classifying the following as offences of 'fraud and forgery':-

- False statements by Company Directors, etc. under Theft Act 1968 section 19  
'...an officer of a body corporate or incorporated association (or person purporting to act as such), with intent to deceive members or creditors of the body corporate or association about its affairs, publishes or concurs in publishing a written statement of account which to his knowledge is or may be misleading, false or deceptive in a material particular...'
- Obtaining property by deception, under section 15 Theft Act 1968
- Common law offence of conspiracy to defraud
- Carrying on business with intent to defraud under section 458 of the Companies Act 1985.
- Insider dealing under the Criminal Justice Act 1993
- Fraudulent trading under Companies Act 1985, Section 458  
'... any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose..'
- fraudulent misappropriation of funds under the Proceeds of Crime Act 2002
- Engaging in a course of conduct which creates a false or misleading impression as to the market in or the price or value of investments, contrary to section 47(2) of the Financial Services Act
- Cheque and Credit Card Frauds , under Theft Act 1968 section 15 (obtaining property by cheque or credit card fraud); Theft Act 1968 section 16 (obtaining pecuniary advantage by cheque or credit card fraud) ; under Criminal Justice Act 1987 section 12 (Conspiracy to commit cheque or credit card fraud); under Theft Act 1987 section 12 (Obtaining services by cheque or credit card fraud); and under Theft Act 1968 section 15A (Obtaining a money transfer by cheque or credit card fraud).
- Obtaining property by deception (apart from cheque and credit card fraud) under Theft Act section 15, and many more.

This is the classification which the police in the United Kingdom use for recording charges of fraud. although an analysis of the charges brought by the Serious Fraud Office in five years' cases to 2003 show that the SFO used only five charges in total, the charge of fraudulent trading , false accounting , theft , corruption , the remaining 60% cases brought on the charge of conspiracy to defraud, the most common charge used

The Criminal Justice Act 1993 states that if persons conspire to defraud and that fraud is to be committed abroad, as long as they conspire in the UK, they can be charged with an offence , although they planned to commit the offence in other countries. Before the Criminal Justice Act 1993, they would not be charged in the UK if they conspired to defraud in the United Kingdom , if the fraud occurred abroad.

The way the Serious Fraud Office brings conspiracy to defraud charges against several senior individuals of a company raises issues of rights to a fair trial when all the defendants are charged and tried together. This is highlighted in the case of R v Sweetbaum, Llewlyn, Carson and Rosenthal in which the joining of all the individuals in one trial did cause a defendant to suffer prejudice when evidence which was not admissible against him, was admitted in the case of a co-defendant, because of compulsory interviewing that the SFO is allowed to carry out in serious fraud investigations.. One of the defendants objected and had to have a separate trial.

The agreement to commit a crime of recklessness can be classed as a conspiracy because the central

focus of conspiracy to defraud has been on the requisite mutual state. So the scope of common law conspiracy to defraud is very wide.

A conspiracy to defraud charge can also be brought as a private criminal prosecution as in the case of *Sears Group Properties Plc v Andrew Scrivener* in which Sears sued the group technical director for conspiracy to defraud the company between 1991 and 1997, alleging that Scrivener conspired with suppliers to overcharge on contracts for fitting out retail premises. Sears claimed damages and an injunction restraining Scrivener from using or disclosing confidential information.

#### The general offence of fraud

The Law Commission's report on creating a general offence of fraud said that juries and all other parties concerned would find easier to understand it than the charge of conspiracy to defraud. The Commission said that the statutory offences do not always give an accurate picture of the fraud in question. The Commission quoted Lord Hardwicke 'Fraud is infinite, and were a court once to ... define strictly the species of evidences of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.' The new Fraud Bill does not model the fraud offence on the offence of conspiracy to defraud which it considers to be too wide. In arriving at a new definition of fraud, the Commission quotes Stephen '... two elements at least are essential... first, deceit or an intention to deceive or in some cases mere secrecy; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy.'

The Commission stated that it accepts these two elements and adds that of dishonesty. The Commission stated that the concept of dishonesty in the fraud offence emphasises the act of the perpetrator and need not be proved to have caused the loss in question. So the offence of fraud would mean making a positive misstatement, or dishonestly making a false representation, or dishonestly failing to disclose information to another. In all cases, it is not necessary that any consequence is brought about by the fraud. The draft Bill does not contain any special defences and the offence has a maximum of ten years.

#### Social consequences of serious fraud

There are great indirect losses that accrue from offences of serious fraud. Examples of such losses are the losses due to sickness and even death that result from environmental pollution of the air and water and from the sale of unsafe goods and drugs, defective vehicles and hazardous clothing. Indirect losses can also include numerous disabilities that result from injuries to plant workers, including contamination by chemicals that could have been used with more adequate safeguards if directors had not tried to deliberately cut corners and cut costs sometimes by fraudulently excluding legal safety steps. Such work related exposures can result in malignancies, lung diseases, nutritional problems and even addiction to legal drugs and alcohol. There is no clear criteria by which such indirect harms through serious fraud can be evaluated.

What can be established, even by cursory glance at newspapers and the media in general, is that serious fraud threatens the trust that is basic to community life, this trust being the social glue of communities. To illustrate the social consequences of serious fraud is the July 2003 case which was a multi-billion pound mobile phone fraud. Telegraph Newspaper of the 10 July 2003 reported that the Office for National Statistics said that imports into the United Kingdom from the European Union were £11 billion a year higher over the past 4 years than had been realised. This meant that the UK's trade deficit for the year 2002 was £4.5 billion, or 4.5% of Gross Domestic Product. The trade figures were revised after an investigation into the fraudulent imports into the UK of mobile telephones through the exploitation of non-payment of Value Added Tax on these products. This particular fraud was said to create a loss to the UK's Treasury of £2 billion in unpaid taxes in the year 2002 alone.

This supports the theory by Geis (1995) that this indirect harm is the most important, long-term harm caused by offences of serious fraud. So let us look at the Serious Fraud Office.

### The Serious Fraud Office

The Serious Fraud Office (SFO) came into being in April 1988, and at the same time every fraud squad in the United Kingdom became part of what is now known as the Fraud Investigation Group (FIG) and the FIG works under the Crown Prosecution Service. These fraud squads are policed by policemen who have volunteered for the positions. The 1890's saw a huge increase in serious fraud and it was the public who demanded that something be done, after which there was a report on the state of fraud.

The Roskill Report contained over one hundred recommendations. The most important recommendation of the Roskill Report was for a 'formation of a single, unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud' It stated that the advantages of such an organisation would be that fewer serious frauds would be allowed to escape prosecution by slipping through the net of a series of independent organisations working in this field, the Fraud Investigation Group, the Department of Trade and Industry, the Inland Revenue, HM Customs and Excise and that this would help investigations to lead to more effective prosecutions.

The Criminal Justice Act created the SFO and made further provisions for the investigation of and trials for fraud and for connected purposes. It set down the procedure for transferring a fraud case from the Magistrate's Court to the Crown Court. Under the Act, notice of transfer to the Crown Court has to be issued before the Magistrate's hearing starts. Pre-trial reviews were now treated as part of the trial.

It gave the judge very wide powers. He could now make orders for the production of a case statement from the prosecution and order defendants to produce statements setting out in broad terms the nature of their defence and where they take issue with the prosecution. He could now decide the admissibility of evidence and questions of law relating to the case. He could order the production of charts and visual aids to help the jury in their comprehension of the case, etc. These are the laid out rules relating to the trials of serious fraud cases which the SFO brings. The SFO does not refer or defer to the Director of Public Prosecutions and is only responsible to the Attorney General.

The key criterion for deciding whether the SFO should accept a case is that the suspected fraud is such that the direction of the investigation should be in the hands of those responsible for the prosecution. Factors taken into account are –cases where the monies at risk are at least one million pounds; cases likely to give rise to national publicity and widespread public concern; cases requiring highly specialised knowledge of stock exchange practices or regulated markets; cases with an international dimension; cases where legal, accountancy and investigative skills need to be brought together and cases which are complex and in which the use of Section 2 powers may be appropriate.

### Section 2 notices

Section 2 of the Criminal Justice Act 1987 contains provisions where, not police, but lawyers and accountants in the SFO question suspects after giving a written notice that they must answer questions about an investigation at a specified time and place or immediately. This power to question is a delegated power from the Director of the Serious Fraud Office. This is a very controversial power to make suspects talk and give papers on pain of imprisonment and in breach of their privilege against self-incrimination.

In serious fraud cases it is the directors of companies, solicitors and accountants who must answer section 2 notices. A notice to a solicitor under section 2 means that a solicitor must breach client confidentiality, as also must a banker under section 2. These powers are an issue which will not cease to be debated.

The European Court of Human Rights heard the case of R v Saunders (the famous Guinness case) and it was very scathing in its comments about the UK Criminal Justice system. It accused the UK of a two-tier system of legislation characterised by establishing investigation proceedings in which

those under investigation are obliged to co-operate with the investigators and to answer their questions, immunity, and making it possible that answers obtained in those investigation proceedings are used in evidence at a subsequent trial against someone who has been under investigation. It notes that the UK justifies this as being for public protection against serious fraud, yet this compulsory answering of questions is not used for other serious crimes such as murder, making the UK's justification flawed. The Commission said that in ordinary crime cases discovery of the crime nearly always precedes the investigation and that the investigation after an ordinary crime is merely to discover who did it, whilst in serious fraud cases the investigation generally has as its main purpose to establish whether or not a crime has been committed at all. The Commission said that the UK's justification failed and that Saunders' right to a fair hearing had been infringed not on the nature of the compulsory answers given under notice but on the use made of them by the prosecution during the trial and that the transcripts at issue were used extensively by the prosecution and that such an infringement of Saunders' right not to incriminate himself could not be justified either by the complexity of serious fraud or by public interest. This case therefore concerned the use in evidence of statements made by Ernest Saunders under section 2 notices. It did not concern answers to questions put under the section 2 interviews because under Article 6(1) ECHR there is no right to refuse to answer questions. The protection of Article 6 starts from the time when a person is charged with a criminal offence. The object of Article 6 is to protect a person throughout a criminal process.

The SFO now states on its website <http://www.sfo.gov.uk>, that

".....A person may refuse to answer questions or provide information or documents if he or she has a reasonable excuse for not doing so. A person's answers to questions required under section 2 may not be used in evidence against them at their trial unless the trial is in relation to an offence of providing misleading information during the section 2 interview itself".

Since the Commission's finding for Saunders, the SFO faces new issues in the use of the transcripts of section two questions and answers in this same way in the case of *R v Battersby, Carson, Llewlyn Sweetbaum and Rosenthal*.

In 2002 one defendant Carson applied to have an extract of another defendant's (Rosenthal) section 2 interview for use in his defence because Rosenthal had admitted that he had read a letter of representation through before he had signed it, and that he signed it, knowing part of it to be false. Because of this application Rosenthal applied to be tried by a different jury on the basis that he would now be forced to give evidence about his own section 2 interview. The prosecution, because of the judgement in *Saunders v United Kingdom*, were not permitted to use these section 2 interviews against the individual defendants, although Carson was allowed to use Rosenthal's section 2 interview answers in his defence and so it was ordered that Rosenthal be tried separately with a new jury. This is the first time that a co-defendant has used section 2 answers of one defendant as part of his defence.

The issue of the use of section 2 answers by one co-defendant in another co-defendant's defence also highlights the great use made by the SFO of the charge of conspiracy. The SFO also uses its special powers for compulsory interviewing of suspects to assist agencies in other countries. Such a large part of its work in the assistance of other countries that it has a Mutual Assistance Department. This department acts on behalf of foreign investigators who seek evidence of a fraud in the United Kingdom. This unit obtains the evidence required and passes it back to the country that made the initial request. The unit has the reputation of servicing foreign requests for assistance very quickly because it can use the section 2 powers granted in the Criminal Justice Act to help overseas prosecutors, asking questions and obtaining documents in exactly the same way as it can in domestic cases.

The foundation for this is the 1959 European Convention on Mutual Assistance in Criminal Matters which was stated to have as its objective ensuring that countries afforded to each other "the widest measure of mutual assistance in proceedings in respect of offences the punishment of which at the time of the request for assistance falls within the jurisdiction of the judicial authorities of the

requesting country” This Convention , supplemented by an additional Protocol in 1978, underpins the International Co-operation Act 1990 which ratifies the Convention but with a number of reservations . The reservations are:- a reservation of the right to refuse assistance if the person concerned has been convicted or acquitted of an offence based on the relevant conduct in the United Kingdom or in a third state; in respect of Article 3, a reservation of a right not to take evidence or gather other material in the face of a privilege, absence of compellability, or other applicable exemption; in respect of search and seizure, a reservation of a right to make action dependent on double criminality and consistency of the execution of the letters rogatory with the law of the UK; a refusal of requests under Article 12 only where it is specifically requested, and will refuse to grant it if it would be against the public interest; and a reservation of the right not to apply Article 21, dealing with information in respect of proceedings.

.The SFO require specific requests for which they use the section 2 notices in this respect. An overseas authority must first make a request for assistance to the United Kingdom’s Central Authority at the Home Office. The Home Office’s Mutual Assistance unit then decides whether assistance should be granted and which body should deal with the request. In serious fraud cases, the requests go to the Serious Fraud Office. The Criminal Justice Act 1990 allows the SFO to give this assistance. Other countries cannot use the SFO’s section 2 notices for vague requests. There has been a recent case *Rio Tinto Zinc v Westinghouse Electric Corporation* , House of Lords, where it was declared that unspecified requests for such assistance is not acceptable. When documents are requested, the request must show that the documents already exist or have existed, rather than being conjectural documents.

Refusal of requests depends on the subjective opinion of the Home Office of the categorisation of the crime to be investigated. For instance, the Home Office may decide that a request does not concern a recognised crime in the requesting country but is merely a political incident and then the Home Office will refuse the request. This was made clear in *R v Secretary of State for the Home Department, ex parte Fininvest SpA* where the relevant request concerned illicit payments to politicians. The Home Secretary took the view that the payments referred to were offences of bribery and corruption and not of false accounting and use of monies for criminal purposes. The Divisional Court upheld his decision, saying that it was for the requested state, in this case the UK, to decide the nature of the offence and not the requesting state. The converse of their decision not to comply with requests for assistance in political cases is found in 2002 when the SFO agreed to assist the Italian investigation into Telekom privatisation when Turin prosecutors came to London.. Italian fraud investigators were looking into allegations of corruption , false accounting , bribery and embezzlement over the privatisation of Serbia’s telephone monopoly under the Milosevic regime.

Until March 2003 the UK refused to assist other countries if the UK considered that execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of the UK. This extended to the protection of the UK’s economic interests. But this is to be changed since the Crime (International Co-operation) Bill of March 2003 which implements various pieces of legislation at European level relating to Mutual Legal Assistance in Criminal Matters, police co-operation, mutual recognition of penalties and terrorism. Clause 20 of the Bill allows for overseas freezing orders to be given effect regardless of the nature of the authority making the order in a participating country. This Bill makes no reference in clause 19 to the use that may be made of seized evidence once it has been sent to the court or authority making the request for assistance. This means that there can be ‘fishing expeditions’ through the use of such instruments as section 2 notices and contrary to article 6(1) of the European Convention on Mutual Assistance in Criminal Matters.

The SFO has new powers under the Enterprise Act 2002 in force since May 2003. The Act introduces widespread changes to competition regulation in the United Kingdom. It is now a criminal offence for individuals to dishonestly enter into cartel agreements. The offence will apply only to horizontal agreements (between undertakings at the same level of supply or production) and not to vertical agreements (between producer and distributor) and proceedings will only be brought in

respect of an agreement that is implemented in whole or in part in the United Kingdom and carries a imprisonment and/or fine sentence.

Under the Act, an individual is liable to criminal prosecution if he or she dishonestly agrees with one or more other persons that they will engage in one or more prohibited cartel activities. These activities are price-fixing, limitation of supply or production, market sharing and bid-rigging.

#### Conclusion

When serious fraud or dishonesty occurs in the UK , the Serious Fraud Office conducts the investigation and prosecution. There may soon be a general fraud offence. but it will not change the way that serious fraud is dealt with in the UK; it may make it simpler for the jury to understand the case. Whether this new fraud offence will be adequate to cover international fraud remains to be seen.

THE END

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