A Report by

JUSTICE

Fraud Trials

Chairman of Committee

BERYL COOPER, QC

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JUSTICE

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JUSTICE

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INTRODUCTION

The prevention of fraud needs to be treated as a matter of high priority, both nationally and internationally. There is a need for the adoption in the commercial world of a more responsible approach to the prevention of fraud. Indeed, investigation should not be restricted to prosecutable offences alone. Financial fraud is now big business. If the increase in fraud throughout the world is to be controlled, then a new and far more aggressive approach is needed by the international commercial community, the world's markets, the international banks, and those responsible for law making and enforcement. No one in the financial world can afford to ignore the rapid increase in economic crime.

The essence of fraud is deception, the use of a false representation to obtain an unjust advantage, or to injure the rights or interest of another. It follows that fraud may be an element in any offence from rape to avoiding taxation. In this report we are concerned with fraud in its commercial aspect. It can range from fraudulent trading by a single person to an international criminal gang using the most sophisticated methods. There may be links with the criminal underworld or there may be underlying political motives. But it must be remembered that at the core of the offence there must be dishonesty, and in this country that word bears its ordinary everyday meaning.

The increasing sophistication of business aids such as computers and the development of instant communication at an international as well as local level means that fraud investigations and trials are acquiring a new dimension.

The fascination of fraud trials for the legal practitioner is that they show the inventive brain at is most ingenious in some cases, or alternatively the tragedy of a business company whose failure is sometimes beyond the control of the directors due to economic changes, but who continue to trade beyond the point when they should.

It is against this background that we have considered the terms of reference of the committee which has been appointed by the Lord Chancellor and the Home Secretary, under the chairmanship of Lord Roskill,

'to consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved, and to consider what changes in existing law and procedure will be desirable to secure the just,expeditious and economical disposal of such proceedings.'

Our Committee consists of members of the bar, solicitors, academic lawyers, and police officers and others used to the investigation of fraud cases. It is against our various backgrounds that we present our report.

TYPES OF FRAUD CASES

It would not be practicable to confine consideration of the problem of fraud trials to classification of cases by subject matter, still less by making a list of statutory offences. Human ingenuity knows no bounds, and a fraudulent way of committing some other offence would undoubtedly be found.

If this is accepted, then a classification of serious fraud must be sought in a consideration of the methods used, the evidence required to prove the offence, and the importance of its possible consequences.

The seriousness of a fraud will usually depend on the financial value of the subject matter, and the consequences to individuals or the public. It would not be useful to classify frauds solely according to the amount of money involved. A loss of thousands of pounds to an individual or a small firm may be more serious in its consequences than the loss of millions to a great public company or the national revenue. There is no doubt that the public has been alerted to the seriousness of frauds, even those on a comparatively minor scale, by the growth of consumer magazines and articles and programmes in the press and the other media.

The opportunity for fraud is constantly increasing as a result of -

(i) The greater distribution of wealth: the increase in the number of persons owning their own homes has been accompanied by an increase in frauds involving estate agents and solicitors, and such matters as the purported sale of double glazing and central heating;

(ii) the greater distribution of goods, leading to hire-purchase frauds, and frauds on insurance companies;

(iii) the development of computers, mechanical accounting machines, and the like;

(iv) the development of huge profits from armed robberies, drug trafficking and pornography and the consequent need to 'launder' money;

(v) the greater ease of communication, both nationally and internationally;

(vi) the development of offshore tax havens.

The investigation, prosecution and trial of fraud undoubtedly varies in complexity. The question we have to consider is whether the trial of fraud cases should be dealt with in the same way and by the same courts and judges as other criminal offences, or whether there should be a differentiation in the treatment of some frauds from others, or frauds as a whole from other types of criminal offences. As we have said, we do not think it would be practicable to attempt a definition of fraud cases by reference to a list of specific offences; fraud is a method by which any one of numerous offences may be carried out, though it always involves deception.

Commercial crime cannot properly be seen simply in terms of an ordinary criminal offence. It can often have wider political and economic consequences. Certainly many commercial crimes are directly related to or connected with non-commercial crimes. Ordinary or petty criminals are often involved as pawns, so that fraud prosecutions often succeed in putting away the 'middle men' of criminal organisations. Well-organised criminal gangs will often set up a fraud in order to 'launder dirty money'. This is already a considerable problem in the United States, and much more needs to be done to prevent its development in this country.

A more forceful policy in regard to the prosecution of fraud cases is required. Relatively minor frauds such as social security frauds are invariably prosecuted because the staff is available to undertake the necessary investigations. On the other hand major commercial frauds often go unprosecuted, partly because of the lesser likelihood of a successful result, but mainly because the resources in manpower and money, as well techniques, are not available to ensure successful prosecutions. There

ought to be a greater readiness to prosecute important and more complicated frauds, despite the expense and the many difficulties known to exist in the conduct of the trials.

INVESTIGATION

The Government has announced the setting up of a new fraud investigation group (FIG) within the Department of the Director of Public Prosecutions, to underpin the new regulatory system for investor protection, on which we understand that legislation is being prepared following the publication of Professor Gower's report on Investor Protection in January 1984. The announcement made by Mr. Nigel Lawson, the Chancellor of the Exchequer, on 3rd July 1984, explained that the plan was designed to reconstitute on a permanent basis the existing ad hoc groups drawn from the police, the Department of Trade and Industry and the Department of the Director of Public Prosecutions.

It ought not to be overlooked to what an extent the Commissioners of Customs and Excise and the Inland Revenue have an interest in the investigation and prosecution of fraud.

The Customs and Excise deal with the collection of duties, including VAT, on imported goods, and the collection of VAT and excise duty on manufactured goods and on services. They are regulated by special statutory provisions such as the Customs and Excise Acts, the VAT Act, and those contained in the various Finance Acts. Last year there were 359 prosecutions for frauds, of which 112 were in the Crown Court, and penalties collected totalled over £500,000. There were 51 VAT prosecutions in the Crown Court and 61 in the magistrates' courts. These do not include failure to make a return or payment. In addition, over a slightly different period, 396 offences were compounded, that is to say no prosecution was brought or a prosecution was discontinued on payment of a penalty by the offender. (We discuss the question of compounding later in this report).

The highest single payment by way of a compounded penalty was £2,700,000 in 1981. It is estimated that there is an annual loss through under-declaration of £250 to £500 million. Offences under the VAT Act include those of being knowingly concerned in or taking steps

with a view to fraudulent evasion of tax; furnishing or sending documents with intent to deceive; knowingly or recklessly making false statements, and a sort of compendious offence where it is alleged that the behaviour must have involved the commission of one or more offences. In recent years hardened criminals have moved in on gold frauds and on other VAT frauds.

Further offences arise in relation to imports. In 1983 there were 53 Crown Court prosecutions and 147 magistrates' courts prosecutions for customs offences. There were 8 Crown Court prosecutions and 39 magistrates' court prosecutions for excise offences. The sort of offences here considered are untrue declarations, misdescriptions, under-valuations, false claims for relief, false statements of origin, and counterfeiting documents. Other offences are concealing or harbouring smuggled goods or being concerned in the fraudulent evasion of duties. There are obviously many other examples. Duty may be deferred on an undertaking to re-export goods and they may then be re-sold in this country. Goods may be removed from a bonded warehouse and their absence covered by false documents.

Any one of the matters with which the Customs and Excise are concerned may give rise to complicated frauds. It is not the nature of the subject but the way in which the defendant exploits the law that causes complications. For example, if a defendant chooses to falsify large numbers of invoices, or to put different figures on his invoices and on his delivery notes, what is in essence a simple system may lead to complications which can result in a long and difficult trial. The greater the documentation and the more difficult it is to trace transactions through various documents, the greater is the temptation to the customs officer to overlook the matter or to recommend that it should be compounded. It could be said that a customs officer discovering a complicated fraud is on to a loser. He is going to commit a great deal of the time of himself and other officers to the investigation. The prosecution is almost certainly going to take a lot of time in the magistrates' courts and the Crown Court, and at the end of the day the customs investigators are quite likely to be criticised for the length and complexity of the proceedings necessary to prove the fraud. Every short cut increases the chance of acquittal, even if it does not lead directly to an acquittal.

But there is no doubt that many important customs and excise cases involve very large sums indeed. The offenders are frequently intelligent, well-educated people who have no excuse for their conduct, which is activated purely by greed. It would be quite wrong if such people were not prosecuted merely because of the difficulty and expense involved.

Turning now to the Inland Revenue, its Inquiry Branch has a professional staff of 90 (101 including Scotland) and investigates suspected cases of serious fraud in relation to taxation. Such investigations are often under the control of chartered accountants, who have the conduct of the matter right through to the administering of questionnaires, the taking of statements under caution, and being present when arrests are made. Another important function of the Inquiry Branch is to investigate cases where there are grounds for suspecting the honesty or competence of practising accountants. In 1981 the Branch settled a total of 438 cases yielding £23 million in tax, interest and penalties. In 1982, 418 cases yielded £35 million. The decision whether to prosecute, based on a report from the Inquiry Branch, is taken in the Solicitor's office, where the day-to-day conduct of prosecutions is in the hands of a mere six lawyers. They in turn have access to Revenue standing counsel. The office is responsible for about 400 prosecutions a year, the majority of which are not major frauds. We understand that the conviction rate in major fraud cases over the past ten years has been 90 per cent. In the nine months from April to December 1983, the Revenue completed 24 prosecutions in cases of serious fraud in which the aggregate tax sought to be evaded was around £5 million. Only two of these 24 cases ended in acquittals.

It is sometimes suggested thatthe Revenue will only prosecute open-and-shut cases. In fact, its limited resources are concentrated on the graver frauds, and its attitude is not one of passing over cases where the evidence is not strong enough, but rather of intructing the Inquiry Branch to find the necessary evidence.

International ramifications

Commander Graham Stockwell, Head of the Metropolitan and City Police Company and Fraud Department, said at a recent conference organised by the Commonwealth Commercial Crime Unit at Cambridge, that international

commercial crime investigations were taking up an increasing amount of his department's time, and that 'in time this must affect the reputation of the City of London'. He reported that London Fraud Squad Officers dealt with 679 cases in 1983, an increase of 185 over 1982, while 383 enquiries were started in the first six months of this year. These investigations led to 139 arrests, 20 higher than in the same period last year.

London has a growing attraction as a centre of international crime, partly as a result of the limitation on the jurisdiction of English courts in regard to criminal offences. This limitation was considered by the Law Commission in its report (Law Com.No.91) on The Territorial and Extra-territorial Extent of the Criminal Law, published in 1978. The Commission felt unable to recommend any general change in the law to the effect that, where any act or omission constituting a prescribed element of an offence occurs in England or Wales, the offence should be deemed to have been committed there, even if other elements of the offence take place outside England and Wales. It did, however, believe that further progress could be made on this aspect of the territorial extent of the criminal law in the context of individual offences, and we hope that this is something to which the Commission will give further consideration in the course of its review of the law relating to conspiracy to defraud.

There is an urgent need for greater, speedier and more effective collaboration in the communication of accurate intelligence between different countries in order to assist in the investigation of international crime. The strict territorial basis of most systems of national law makes it difficult and sometimes impossible to obtain statements from foreign nationals except by means of investigating officers from the country where the national resides. Even then, the statement may not be admissible in evidence. This naturally hinders investigation, and may make the taking of essential evidence quite impossible. The position is further complicated by the problems arising from the extradition of criminals or suspects from one country to another.

The rules of evidence require amendment to make it easier to admit evidence, particularly formal evidence, taken outside the jurisdiction. This might to some extent be achieved by amendment of the Criminal Evidence Act 1965 to include business records kept outside England and Wales, and to allow the production of formal records such as records of Government agencies which would be admissible if they were English records. Provision should also be made for the admissibility of banking records and statements of accounts kept outside the United Kingdom.

Delay

A serious obstacle to the prompt initiation of proceedings in fraud cases lies in the long delay experienced before police and other investigations begin. This is partly due to the reluctance of individuals and companies, and particularly of banks, creditors and liquidators, to involve the police or other investigating authority at an early stage of the fraud, in the optimistic, though ill-founded, belief that the situation will improve given sufficient time. The incestuous element in fraudulent activity is reflected in the role played by banks who, instead of calling attention to the fraud, often encourage the bolstering up of the weaker parts of an enterprise through the transfer of funds. The police may be slow to take the initiative because they feel that they are merely being used as a debt-collecting agency. Another factor making for delays in the investigation of highly complex fraud cases calling for experience, training and skill is the use of investigators who are often 'learning on the job' and changed every two years or so.

We would emphasise that undue delay in the initiation of proceedings is not only contrary to the public interest but is also extremely oppressive to defendants (particularly those who are subsequently acquitted) who may find themselves having to face charges for several months or even years.

We think there is much to be said for the United States practice of co-ordinating the efforts of a number of specialist agencies by means of 'task forces', thus avoiding the duplication of effort of which there are too many examples in this country. It may be that FIG will meet this need.

In many agencies in the United States, such as the Securities and Exchange Commission and the Department of Justice, encouragement is given to young lawyers and accountants to join the agency with a view to advancing their career prospects outside the public service at a later stage. Although some remain in the agencies for some, if not all, of their professional lives, short-term service of between 3 to 5 years, followed by transfer to the private sector, is a common occurrence.

By contrast, the career structure of our Civil Service is quite different. Although there is some movement of lawyers and accountants

from Departments to the private sector, it is almost unheard of to recruit professional staff on a short-term basis. Indeed, employees are encouraged very strongly to remain in the Civil Service once they have been recruited, and any indication that a person has the intention of moving into the private sector may well be regarded as a strong reason for not recruiting him or her in the first place, or as an obstacle to subsequent promotion. There is, we believe, a real need for those responsible for recruitment within the Civil Service to enter into discussions with the Civil Service Unions in regard to the possibility of recruiting more young lawyers and accountants on a short-term basis. Some recognition would no doubt need to be given to the fact that they would gain no benefit from the present arrangements for non-contributory pensions.

Forensic assistance

Another area where investigating departments and the police need greater assistance is in higher quality forensic evidence. With the development of computer and microchip technology, it is essential that investigators should be able to call in the help of the most highly qualified forensic experts. There is a marked reluctance in England to use the universities for this purpose. A lesson could be learned from the Scottish system, where much of the work is carried out in the universities, and where practical work, training and experimental work is done side by side. We see no reason why such experts should not be seconded to work within the departments for periods of time, or alternatively why forensic reports should not be obtained from the universities. It might often be simpler if an investigation were carried out at a local university rather than in a central department.

Police training

If fraud trials are to be effective, it is essential that there should be a firm grip on the investigations from the outset. We doubt whether police officers engaged in the investigation of complex frauds receive adequate training for this work. Moreover, investigations can often be hampered if they have to be conducted across the boundaries of different police forces. In particular, there is a lack of financial resources,

manpower and expertise in the smaller forces to undertake such investigations. There appears to be a lack of standardisation between different police forces in investigation techniques and presentation of evidence. We think there is a need for the introduction of better training courses to enable officers to have a more thorough knowledge of company law, accounting, computers and modern methods of communication. At present, most officers spend only a few years attached to the fraud squad. The time has come to develop a proper career structure for officers who wish to remain on such work.

Presentation of documents

Greater thought needs to be given to the way in which documentary material is presented to the court. At present it seems often to be put together without any clear plan as to its presentation. We think better consideration should be given to the arrangement of material to be used in the case. The evidence would be no less true if presented in an attractive form. There is no reason why charts should not be used, or schedules produced, which are easily read. The investigating officers need either to be trained to do this, or have the advantage of being able to call in an expert in graphic design, or other appropriate skill, who can help them present their case in a clear and simple manner.

At present it far too frequently happens that even after a case has begun the prosecution are still continuing to produce fresh documents for the defence to assimilate. This should only happen in exceptional cases when the need could not be foreseen. We believe it is most important that the prosecution case should reach the Crown Court properly prepared, and later in our report we indicate how we think this should be done. It can only be achieved if there is a proper understanding by the prosecution of the case they have to present. We believe that it is essential that counsel who is to conduct the case should be consulted at an early stage so that he may if necessary guide the form of the final investigation and documentation. It may well be that if an independent prosecution service for England and Wales is set up as proposed in the White Paper, Command 9074: An Independent Prosecution Service for England and Wales, many of the difficulties now experienced will be overcome.

THE DECISION TO PROSECUTE

Inevitably there are unlikely to be sufficient resources to prosecute all cases, and it will therefore continue to be necessary to decide on priorities and targets. Co-ordination, if not direction, is required from a high level on the basis of the maximum input of intelligence and information In Hong Kong a Standing Commercial Crime Liaison Committee has been established under the Attorney General on which securities and banking commissions are represented. We hope that equivalent steps will be taken by the FIG.

Many factors relevant to the prosecution of commercial crime are common to all types of crime; for example, whether there is sufficient evidence for a conviction, the time that has elapsed from commission of the offence, the difficulties resulting from evidence from other countries, factors personal to the accused, the attitude of the victim, matters of restitution, immunity of an accomplice, or improper conduct by the police. The factors particularly applicable to fraud cases are the complexity of the case, calling for a nice judgment on the likelihood of a successful prosecution, and the difficulty of proving the necessary intent to defraud.

CHARGES AND INDICTMENTS

Once the decision to prosecute has been taken, the next matters to be considered are the appropriate charges and the form of the indictment. The charges initially preferred by the police or other investigating authorities can frequently determine the fate of the case. Because prosecutors are often faced with a welter of papers and a very short time in which to settle the indictment, there is a strong temptation either to follow the charges initially preferred, or to charge a general conspiracy between the widest possible opening and closing dates. Nothing is more likely to ensure that the case will be contested at trial, with each defendant disputing his role and the true starting date of the fraudulent conduct in all likelihood being suggested by the trial judge towards the close of the prosecution case.

This is not satisfactory. It is when the indictment is preferred that time should be taken to look at the case as a whole, taking into account the strength of the evidence, the possible time that the trial will take, and the probable sentence if the defendants are found guilty.

Clear decisions should be taken at this stage as to whether all the suspects should be prosecuted, or whether it would be better to confine the trial to the principal defendants alone. It is also important that the draftsman of the indictment should consider the question of possible compensation. In most cases of fraud and dishonesty, the victims are individuals who can be identified. In the case of Revenue and Customs frauds it is the State itself which is the victim, and these cases are frequently dealt with by the exaction of a penalty without any prosecution under the powers conferred by section 102 of the Taxes Management Act 1970, and section 152 of the Customs and Excise Management Act 1979. We deal with these powers later in this report.

There are two main failings with indictments in fraud cases. If wrongly drawn, they can result in acquittals which, on the evidence, should not occur, or alternatively can lead to unnecessarily long trials. The case of R. v. Ayres (1984) 2 WLR 257, apparently put it beyond doubt that if a conspiracy involves the commission of a substantive offence, it can only be charged under section 1 (1) of the Criminal Law Act 1977. In his judgment Lord Bridge of Harwich said:

> 'Section 5 (2) of the Act, which preserves conspiracy to to defraud at common law as an exception to the general abolition of the offence of common law conspiracy by section 5 (1),concludes with the words; "... and section 1 above shall not apply in any case where the agreement in question amounts to a conspiracy to defraud at common law". I can see no escape from the stark choice of alternatives which this plain language imposes. According to the true construction of the Act, an offence which amounts to a common law conspiracy to defraud must be charged as such and not as a statutory conspiracy under section 1. Conversely a section 1 conspiracy cannot be charged as a common law conspiracy to defraud. It is in my opinion of considerable importance to bear in mind the implications of the facts that the offences are thus mutually exclusive in approaching the problem of construction.'

Later on he continues:

> 'The passing of the Act followed the publication of the Law Commission Report No. 76 in March 1976. It is legitimate to look at that report to ascertain the mischief which the statute was intended to remedy. To attempt briefly to paraphrase and sum up, without quoting, I read the report as identifying the defect in the previous law of criminal conspiracy as arising

> from the uncertainty as to what might constitute the subject matter of an agreement amounting to a criminal conspiracy, which, in general terms, could only be eliminated by restricting criminal conspiracies to agreements to commit susbstantive criminal offences. But as a gloss on this main theme, the report recognises that an unqualified restriction of criminal conspiracy to such agreement might leave gaps in the law in certain areas, including fraud, which only the retention of the common law conspiracy offence could cover.'

In the more recent casesof R. v. Tonner and R. v. Evans (The Times, 6th July 1984), it was put beyond doubt that if a conspiracy involves the commission of a substantive offence, it can only be charged under section 1 (1) of the Criminal Law Act 1977. In that case, the Court of Appeal substituted conviction for fraudulent evasion of tax, but it is a rare fraud that does not offer a possible charge of false accounting.

No doubt the ideal indictment in a fraud trial would contain simple counts to which the defendants cannot help but plead guilty, but which would allow the prosecution to open the full extent of criminality and the judge sufficient scope to pass an appropriate sentence. It is rare that this ideal can be achieved with conspiracy counts.

At present prosecutors often simply do not have the time to get a grasp of the case before settling the charges, and are expected by those who instruct them to continue the case against all those committed for trial, not matter how weak the evidence may be against peripheral defendants. The drafting of the indictment tends to be regarded as no more than a necessary mechanical chore as the increasingly unwieldy prosecution case lumbers on towards trial. It should be said too that frequently the draftsman of the indictment is faced with a vast pile of papers without any indication by the investigators of the documents on which they rely to prove the various charges. Of course, this is not true in all cases, but at the present time the quality of the investigative work varies considerably between different police forces, and different prosecuting solicitors departments.

A system of pleadings?

Criminal lawyers sometimes look enviously at the system of pleadings in civil cases in the belief that the flurry of paper passing between the parties before trial always succeeeds in defining the issues so that each knows what case he has to meet. In reality, civil pleadings are

often a complex tactical game played more with a view to interlocutory relief and settlement than to what may happen at trial. Even in civil cases it is often only the strongest of defences which are pleaded in detail from the outset.

There are important distinctions between civil and criminal cases bearing directly on the potential usefulness of pleadings in the latter. In the civil context both sides are forced to attempt to be constructive in their presentation and interpretation of evidence. Each is attempting to erect a convincing structure so as to sway the tribunal on a balance of probabilities, whereas in a criminal case confusion or doubt will frequently operate to secure an acquittal.

While frauds are usually more complicated to present to a jury than run-of-the-mill crime, that does not seem a compelling reason why a business or professional man, facing charges arising out of his employment, should be deprived of basic rights enjoyed by an alleged shoplifter. Why should a bank robber who uses a gun be entitled to keep his powder dry at trial, while his counterpart who uses a computer terminal to steal from the same bank is asked to identify before trial what he considers to be the weak parts of the prosecution case against him? It would obviously be unacceptable for a defendant to be obliged to reveal the main lines of his case if charged with certain offences, but not to have to do so if charged with others. There are other problems of ethics and sanctions which make a full pleadings system difficult. A solicitor is not permitted to reveal his client's defence unless specifically instructed to do so. No doubt there will continue to be attempts to penalise on legal aid taxation those counsel who are instructed (or themselves choose) to test every facet of the client's case. There are sufficient handicaps already for those defending the heavier frauds on legal aid without imposing on counsel financial penalties beyond the present low allowance on legal aid refreshers. It would very rarely be possible to provide a sanction which would bite on the client rather than on his representatives, since it must always be assumed that the latter bear responsibility for the conduct of the defence.

COMMITTAL PROCEEDINGS

Committal proceedings can create a problem in complicated cases. These normally go through the magistrates' courts quite quickly, as the defence lawyers, on reading the statements and exhibits presented, accept there is a case to answer, and the case is then committed to the Crown Court. The difficulty and expense arise where evidence is challenged at the lower court. This is particularly true when witnesses are required to come from abroad.

In a small proportion of cases there are full committal proceedings with witnesses being examined before the magistrates. The reason for this is that a defendant may wish to challenge the evidence at this early stage because he thinks he can establish that he has no case to answer. Sometimes complicated questions of law are required to be dealt with at the committal proceedings in order to establish that there is a technical defence. From time to time committal proceedings of this kind take up many days, and it would seem apparent that magistrates' courts are not well equipped to deal with such cases. Even with a stipendiary magistrate it is wasteful that a busy court should be forced to hear many days of evidence before the case is committed to the Crown Court. It is plainly difficult for the magistrate or magistrates to find time to read the number of documents and witness statements, which may run into many thousands of pages.

The Scottish pre-trial procedure is quite different and there is a suggestion that a similar procedure should be followed in England and Wales. That would mean that committal proceedings would cease and a new procedure would take their place. The bulletin of the Judicial Study Board No. 11984 refers to a discussion that took place at the Seminar for Circuit Judges and Recorders in September 1983. Apparently there was general acceptance that committal proceedings should be abolished.

> 'Broadly, this would entail the abolition of committal proceedings and, save for the right of the defendant to elect trial as heretofore, the determination of the mode of trial by the new prosecuting authority. Thus, the delivery of an indictment or summons would be the first step after investigation followed by service of: (a) a list of witnesses and bundle of copy statements; (b) a list of exhibits; (c) a form asking for admissions, likely plea, witnesses required at trial, particulars of alibi, length of trial etc; (d) a notice informing the accused of (i) his right to have any witnesses examined before a magistrate and (ii) his right to apply to the Crown Court for a ruling that the statements disclose no case to answer.'

Whether the existing committal procedure is retained or some new procedure is devised, we are of the opinion that it is essential that there should be firm control of the case from the moment that the defendant is served with either indictment or summons. If there are still to be preliminary proceedings in the magistrates' court, it seems to us essential that very shortly afterwards a judge should be allocated to try the case. In the Commercial Court it is the practice for a judge to be allocated to the case at an early stage, and from that time on he has the conduct of all interlocutory proceedings. We think the same principle should apply to fraud cases.

PRE-TRIAL PROCEDURE

The present pre-trial review could be made more effective if:-

(a) it were always conducted by the trial judge;

(b) the leading counsel, whether or not Queen's Counsel, retained to represent the parties at the trial, were expected to appear on the review;

(c) the review was not a single hearing held shortly before trial, but a series of two or more hearings on set dates after committal.

What we have in mind is that shortly after service of the indictment, there should be a preliminary hearing at which much of the business now transacted on a pre-trial review would be effected. The main problems with pre-trial reviews at present are that they take place before prosecuting counsel has supplied copies of his opening, they are not necessarily attended by counsel briefed for the trial, the judge is not familiar with the details of the case, and there is no follow-up to ensure compliance with directions given at the review. It is frequently only on the first day of the trial itself that counsel instructed for the trial meet.

Long fraud trials are usually fixed for hearing 3 to 6 months in advance. If not fixed that far in advance, the counsel selected would not be available to appear in them. The reason why counsel at trial so often fail to appear on the pre-trial review is quite simply because, in the nature of their practices, they are part-heard elsewhere. It is unrealistic to expect counsel whose work tends to be in long trials to refuse work so as to be available for a short pre-trial hearing.

If attendance by trial counsel at the pre-trial review is important, as we emphasise that it should be, then whatever facilities are necessary should be afforded to such counsel to enable them to attend the review, if necessary at the expense of adjourning any other trials in which they may be engaged. We regard it as essential that both counsel and solicitors should receive proper remuneration for all the work that will require to be done in connection with the new type of pre-trial review we envisage. We suggest that the brief fee, or a high proportion of it, should be paid on the attendance at the pre-trial review. Wehave little doubt that counsel would prefer to attend their own pre-trial reviews if they were free to do so. There may be a case for holding pre-trial reviews after normal court hours, if that is convenient. What is certain is that a change is necessary in the attitude of administrators to the 'convenience of counsel' in this context. The attendance of counsel actually briefed is so important that counsel's diary should be a primary consideration.

The real problem with pre-trial reviews at the moment is that neither counsel nor the judge is likely to have had sufficient time to get up the case and identify the issues. If the case is too complex to get up overnight, counsel will tend to leave full preparation until the week or the fortnight before the trial. There is not sufficient incentive, financial or otherwise, to get a grip on a case (in which there may or may not be a plea) six or even three months before the trial for the purposes of a pre-trial review. Moreover, taxing officers need to recognise that cases have to be 'got up' again before the trial. Equally, sufficient 'reading days' are not allowed to the judge before the pre-trial review. In the result, at present only prosecuting counsel is likely to know what he is talking about at a pre-trial review, and then only if he has already written his opening.

We are confident that more flexible listing, an extra pre-trial review as a matter of course, proper remuneration for the preparatory stages of such a trial, and a greater allowance of reading time for the judge, would save a great deal of time and money in the long term.

A pre-trial review in two or more stages, presided over by the trial judge, would give everyone involved less excuse for not having served particulars, tidied-up schedules, agreed jury bundles, or made admissions

by the second or even third stage of the review. The secret of saving time in preparation and at trial is to find a way of concentrating everyone's mind on the problems early. In that exercise the constant presence of the judge who knows the case and will try it is, we believe, essential. If the judge is in control of the case from the earliest moment, he will be in a position to encourage both prosecution and defence to agree facts.

We think that the prosecution, possibly before committal, and certainly before the pre-trial review, should serve upon the defence a list of the facts which it is thought likely that the defence should be able to admit under section 10 of the Criminal Justice Act 1967. This could avoid the expenditure of time and effort required to prove facts that will not eventually be in dispute. It may be possible, too, that in the area of any expert report, agreed statements of facts can be produced, as is now frequently done in civil cases. At least this would isolate the areas of disagreement. If facts are not agreed at this stage, and it later turns out that they are not challenged at the trial, that could be a matter to which the judge would draw the attention of the taxing officer.

We believe that these procedural alterations would be valuable in themselves, and would be rendered more valuable if combined with the limited form of pleading that we propose later. Further clarity might be aided by the use of accountants and other specialists in appropriate cases. The defence often finds that it is at a great disadvantage compared with the prosecution. Application therefore has to be made by the defence solicitor for such expert witnesses and evidence as the defendant requires. The initial application is made to the administrative staff of the court concerned, but where a difficulty arises and the application is refused, it ought to be renewed to the trial judge, either at a preliminary stage even before the pre-trial review, or at the review itself. It is clearly essential that such evidence should be prepared well in advance, and with the well-known difficulty at the present time of obtaining expert advice, it is even more essential that this should be available at an early stage.

Many of the difficulties in fraud trials arise because proper payment for the preliminary work is not allowed. A court clerk looking at papers months after the event can have no idea of the amount of work

that has had to go into the preparation of schedules, and the agreement of facts leading to further schedules. It is relevant here to bear in mind what Mr. Justice Thesiger said in his judgment in R. v. Churchill (1965) 49 CAR 317 :

> 'I have checked from the typescript of the manuscript in the Inner Temple Library the observations of Sir Frederick Thesiger who appeared in that case (Stapleton (1851) 8 Cox CC 69) for the Crown, and I see that he said ...'it took me eleven whole days to read the papers through to ascertain what they contained, and many days afterwards to separate what was material from a mass of immaterial statements. The fact is that the able solicitor by whom I was instructed, having been for many weeks employed in the investigations of the affairs of the bank under the bankruptcy, thought that these proceedings might be of some importance, and I had to read them all through to discover that they had no bearing upon the prosecution. I was compelled at last to make out my brief for myself, by selecting all that was material to be adduced in evidence, and some idea may be formed of the extent of my labours when I mention that my notes occupied 70 pages.'

If a judge is in control of the situation he will immediately grasp the need for time to be spent on such work, and be in a position to ensure that it is properly paid.

We have not overlooked the fact that a committee under the chairmanship of Lord Justice Watkins, which was appointed to consider improvements in the preparation of cases for trial in the Crown Court, was critical of the present arrangements for pre-trial reviews. It regarded them as expensive and difficult to list, to be used only as a last resort if matters cannot be resolved or issues sufficiently defined on paper. The Committee went on to say, however:

> 'If one does take place, we think it is essential that the judge should decide, and the parties should know in advance, precisely what matters they will have to address themselves to at the hearing. To that end, we have prepared a standard notice (Annex D) to be issued to the parties, in which the court can indicate by deletions and additions what it wants discussed, and which will function as a checklist for the judge... One of the defects of the pre-trial review as it operates at present in the Crown Court, and of the informal systems for providing information for listing purposes, is that they lack 'teeth'. '

We believe that what we have said above will meet these criticisms.

There are in existence two sets of guidelines for the trial of fraud cases enunciated in R. v. Simmonds (1967) 51 CAR 316 and R. v. Landy (1981) 72 CAR 237. These emphasise the importance of the early delivery of a copy of the prosecution's opening speech. The form of that speech is not mentioned. We suggest that it should be required to deal with all the essential facts of the case, setting out (a) the primary facts; (b) the sources of those primary facts, whether they are witnesses or exhibits; (c) the inferences sought to be drawn from those facts; (d) any essential propositions of law; and (e) the consequences of the foregoing in relation to each count in the indictment, so that the evidence relied on can be clearly traced. While it will be necessary in the body of the speech to deal with these matters discursively in relation to each factual or historical area of the case, there is no reason why there should not be a resume of those matters in schematic form by way of conclusion. Far from being unnecessary duplication, we suggest this may be of practical benefit.

The part of the speech setting out (a) the primary facts; and (b) the sources of those facts can then be served on the defence to see if admissions can be made, although for the reasons set out above, such admissions must continue to be voluntary. We think that if such admissions are made, the prosecution should be precluded from using the admitted facts to raise any inferences other than those specified in (c), except with leave of the court. Leave should be in the discretion of the judge, but such discretion should normally only be exercised in the prosecution's favour where the inference stems from admitted primary facts and from further facts produced by the defence in the course of the trial. This would have the effect of forcing the prosecution to get its tackle in order.

We suggest that a copy of the opening speech should be delivered not later than one week before the first pre-trial review. We further suggest that admissions, if any, should normally be delivered before the second review.

It should be open to the defence to deliver interrogatories to the prosecution, provided they are directed to essential elements in the case and are reasonable in their nature and extent. If the requests are

refused, a ruling should be sought from the judge. There is no reason why time-wasting, obstructive or irrelevant interrogatories should not be penalised in costs, since they will arise out of the fault of legal representatives and not defendants.

THE TRIBUNAL

The principal reason for the setting up of the Roskill Committee was the view, which has received authoritative support, that trial by jury is an unsatisfactory method of dealing with long fraud cases.

In the invitation for evidence sent out by the Committee, paragraph 4 reads as follows:-

> 'The prevalent disquiet, whether justified or not, with the present system of jury trials for what have come to be called "serious fraud cases" is well known and has led to the setting up of the committee. The committee, therefore, sees as its principal task the review of that system in the light of the evidence which it expects to receive. The complaints include the length of some recent fraud trials and the unfair burden which the system is said to cast upon those selected for jury service in these cases as well as the difficulties which some juries are said to have encountered in assimilating a mass of often highly technical and complex evidence. Suggestions have been made for different modes of trial in these cases, as for example trial by a single judge sitting either with assessors or with a jury, whether of the same or a smaller number as at present, selected for its special qualifications, or trial by three judges, with perhaps one with special qualifications, sitting without a jury, to mention but a few of the possibilities which have already been publicly canvassed.'

In his Denning lecture given to the Bar Association for Commerce, Finance and Industry on 29th March 1983, Lord Roskill said:

> 'The nine or six-month trial or even the three-month trial in a commercial fraud case is a modern phenomenon. It never took place 50 years ago... The great fraud cases between the two wars were short causes compared to today's fraud trials. These mammoth trials are unfair on the accused upon whom the strain must be appalling. They are unfair on juries who are unaccustomed to sitting in one position day in and day out and listening. They are unfair on the trial judge, who, as anyone who has tried these cases as a trial judge knows, has to carry the most enormous burden. They are unfair on counsel. They are unfair on the taxpayer who ultimately foots the bill on both sides, win, lose or draw.'

What is suggested, therefore, is that because of the length and complexity of many fraud trials (which we believe could be both shortened and simplified if the various changes which we recommend elsewhere in this Report were adopted) the system of trial by jury, which has served this country so well for centuries, should be abandoned in a limited but significant class of case which is not capable of precise definition.

We believe that this would be a change of profound significance which ought not to be made unless there are compelling reasons for thinking that juries cannot be relied upon to do justice in fraud cases. In this context, we would echo everything that has been said by the defenders of the jury system in criminal cases from Blackstone to Lord Devlin. In his classic book on Trial by Jury, Lord Devlin described it as 'the lamp that shows that freedom lives' and quoted with approval Blackstone's words:-

> 'So that the Liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price all free nations must pay for their liberties in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the disuse of juries in questions of the most momentous concern.'

We do not think it can be shown that the average juror is any less capable of understanding and weighing the issues in a case of serious fraud than in any other serious criminal case. Those of us with direct experience of fraud trials, whether from sitting judicially or appearing as counsel, have in fact been impressed by the performance of juries in these cases. Nor should it be overlooked that many of the most complex cases to come before the criminal courts in recent years - for example, those resulting from the investigations known as Operation Julie, Operation Lager, Operation Snowball and the Headless Corpse Case - were not fraud

cases at all, but involved allegations of murder or conspiracy to supply dangerous drugs. We are not aware of any suggestion that trial by jury should be dispensed with in cases of this kind, but there is always a risk that if changes are introduced for one type of case they may come in course of time to be applied to others for which they were not intended. It would be very unwise not to heed Blackstone's warning in the passage we have quoted above.

In his judgment in R. v. Simmonds (1967) 51 CAR 316 (to which we refer in more detail later) Mr. Justice Fenton Atkinson said: 'It is, however, right to mention that the calibre of juries today can be high, and that their capacity to follow weeks of evidence should not be under-estimated.' We agree, and are firmly of the view that no change should be made in the present arrangements for trial by jury in cases of serious fraud. We think it necessary, however, to consider the various alternative possibilities canvassed in the Roskill Committee's invitation for evidence.

Special juries

Some form of special jury would probably be the least unattractive alternative if it were practicable. The old distinction between common and special juries was abolished by the Juries Act 1949, except for the trial of civil actions in the Commercial List, for which it was in theory still possible to ask for a special jury until the passing of the Courts Act 1971, although in fact this was very rarely done.

The qualifications for a special juryman were that he must be an esquire or person of higher degree, or a banker or merchant, or the occupier of premises of a higher value than that required in the case of the common juryman. By 1949 these requirements were plainly out of date and thought to be symptomatic of class justice and no doubt this would be even more true today.

We do not think it would be easy to devise acceptable qualifications for entry in a special jurors list which would be consistent with the principle of the random selection of jurors, and we doubt whether a jury so selected would in practice turn out to be any more satisfactory than the ordinary jury.

Assessors

The use of assessors would in principle be open to much the same objections as the re-introduction of special juries, and the difficulty in regard to random selection would be much greater. However, the conception of assessors has a rather specious appeal which might make it less unattractive politically, and it has certainly received powerful support. Professor Gower, in his recent report on Investor Protection, said that he thought that both special juries and assessors would be preferable to the present system. He doubted whether the length and complications of trials would be materially reduced by using special juries.

> 'On the other hand, that might be achieved if hearings were by a judge and two experienced lay assessors - the normal method of conducting trials for most serious criminal offences throughout a large part of the common law world. In civil proceedings this method is already theoretically possible, but rarely resorted to except in some Admiralty cases where a judge sits with two Masters of Trinity House, in some patent cases, and in the Restrictive Practices Court, where the bench consists of a High Court judge and businessmen. That trials for commercial fraud conducted by a similar method would be speedier and cheaper and provide a greater likelihood of convicting the guilty and acquitting the innocent I have no doubt. If that is right, all except those who contemplate committing commercial fraud ought to support the change and recently both the Lord Chancellor and the Lord Chief Justice have advocated it. But they seem to share my scepticism about whether it is practical politics, both because, in the words of the Lord Chief Justice, "there are no votes in changing the jury system" and because of the veneration in which the jury is held as the bastion of our liberties.'

Similarly, Professor R.M. Jackson in The Machinery of Justice in England (6th Ed. p. 407) said:

> 'It would not be practical to re-introduce special juries because of implications of class justice, but there is much to be said for trying commercial fraud cases by a judge and assessors. That would provide a court that could be hand-tailored to meet the needs; the judge would sit with say 2 or 4 assessors drawn from panels of persons having commercial and financial experience. Whilst I think that there is a special and strong case for assessors instead of juries in commercial cases, I think there is much to be said for replacing juries by assessors generally. The assessors would be drawn from a specially appointed body of men and women.

> They would sit on the bench with the judge or chairman and retire with him. The judge would rule on all matters of law and procedure, but the whole court would decide on the verdict.'

No doubt the practice of a professional judge sitting with laymen has become more familiar since the setting up of the Crown Court, in which, in some classes of cases, the judge may, and on appeals or committals for sentence, must, sit with lay justices and in the event of a division of opinion may be over-ruled by them.

But this is not really a very good analogy. Even when the case is tried before a court including lay justices, the verdict is still that of the jury. Moreover, justices sit only in the less serious classes of cases which do not normally take a long time to try. Assessors, on the other hand, would ex hypothesi be called on to sit in the longer and more complex types of case.

If one disregards as unrealistic Professor Jackson's suggestion that assessors might replace juries generally, how would the categories of cases suitable for trial with assessors be defined? Any classification would have to be as flexible as possible, perhaps along the lines on which Official Referees' business is defined by the Rules of the Supreme Court. In effect, trial by a judge sitting with assessors would be confined to cases where the trial is likely to be a long one involving prolonged consideration of documents or accounts or the investigation of commercial or financial practices.

Some such restriction as that described above would seem to be necessary if the use of assessors were to be kept within reasonable bounds. One of the practical problems with assessors would be the formation of panels of suitably qualified people able and willing to sit for the length of time involved. Nothing would be gained if the assessors did not possess a sufficient degree of expertise, though no doubt they need not necessarily have thebackground commonly associated with the old City of London Special Jury. Some lay magistrates, but by no means all, would be suitable, but the pressure on the best magistrates is already pretty heavy. People too old for jury service (i.e. those over 65) would presumably be regarded as unsuitable, although no doubt many professional

people continue to be active up to a later age. Those still in active work would have to be paid realistic fees for sitting.

We think that the difficulty of setting up panels of people with appropriate commercial and financial experience ought not to be underestimated. If, however, the line were more widely drawn so as to include persons with adequate educational or intellectual qualifications, one would be likely to be met with the criticism that an attempt was being made to re-introduce special juries under another name.

If it were to become possible to order trial with assessors, the court would presumably need to be able to do so of its own motion, as well as on the application of either prosecution or defence. The matter would thus have to be dealt with on the pre-trial review.

If assessors were used, what would be their role? They would retire with the judge at the end of the trial, and be associated with him in the decision of the court, which would presumably be announced by the judge in a reasoned judgment. We think that for a conviction the verdict would require to be unanimous; with such small numbers a majority verdict would be unacceptable.

Other questions to be decided would be:

(i) whether the judge should rule on all matters of law and procedure, as Professor Jackson proposed, or whether the assessors should have the power to overrule him even on such matters;

(ii) whether the sentence should be that of the majority, as happens already when lay justices are sitting in the Crown Court.

We accept that if assessors of the right quality were available, this might tend to shorten trials, but we think that there are objections to the use of assessors which should rule them out.

(i) We doubt whether it would be possible to provide any acceptable definition of cases suitable for trial with assessors. The decision on whether a trial should be with assessors or a jury would have to be left to the discretion of the judge in any individual case. That opens the process

to the gravest criticism. A defendant would often be likely to want trial by jury when the prosecution, rightly or wrongly, had applied for trial with assessors. The decision would have to be made by the judge who was to try the case, and if he decided in favour of assessors the defendant would inevitably regard this as unjust.

(ii) Assessors might well apply a different test of dishonesty from that applied by juries. That might happen in two ways. First, the assessors' level of business or accountancy competence might lead them, despite their own best efforts, to conclude that incompetence or negligence put forward by way of defence must arise from dishonesty, when a jury might decide otherwise; and secondly, they might find technical defences attractive which would be repugnant to juries.

(iii) Differing standards of justice would result. Thus, if a man with a gun robs a bank, he has the opportunity to be tried by a jury and to be judged by the standards of honesty of the ordinary citizen. With trial by assessors, a man who stole from the same bank using a computer would not. That, we believe, would be unjust and would certainly be thought by the ordinary man to be unjust.

(iv) The cost of employing assessors would be considerable, though obviously not insuperable. We are told that a partner in a firm of chartered accountants could expect to receive something like £600 a day, although we recognise that many professional people of high quality, particularly those who have retired, might be willing to act as assessors for much more modest remuneration. We see no need to confine assessors to highly qualified professional people: what is required is persons who are financially literate. Even so, it seems safe to to assume that there would be an added cost of at least £2,000 per week for each trial, assuming two rather than four assessors. We think this money would be better spent, as we have already recommended, at an earlier stage in the trial process. It seems very doubtful whether assessors could save enough time, as compared with jury trial following a reformed

procedure, to recover the considerable extra expense. It should be borne in mind that the presence of assessors cannot make witnesses speak, or counsel think, more quickly, or enable the judge to make his notes more quickly.

Trial by judge alone

Another alternative canvassed by the Roskill Committee is trial by judge alone. We would regard this as much more objectionable than trial with assessors in departing even further from the classic safeguards of trial by jury as expounded by Lord Devlin and other supporters of the jury system. The fact that in Northern Ireland, in the special circumstances which prevail there, judges sit alone for the trial of certain categories of offences involving the use of explosives or firearms does not in our view provide any good reason for making a change of the kind suggested.

If, however, trial by judge alone were to be possible in fraud cases, it would be necessary to consider whether this should require the consent of the accused or whether it could be ordered by the court of its own motion, presumably on the pre-trial review. In Canada and certain parts of the United States an accused person can elect for trial by judge alone, and we understand that this happens not infrequently. It is impossible to say how such a system would operate in this country, but we would have no hesitation in saying that we think it would be wrong to give the court power to order trial by judge alone against the wishes of the accused, and we do not believe this would be acceptable to public opinion.

Trial by three judges

Another possibility suggested for consideration by the Roskill Committee is trial before three judges. This would have the advantage of reducing the personal idiosyncracies of the single judge, but would otherwise be open to the same objections as trial by judge alone. In any event we think it would make impossible demands on the available judge-power.

Improving quality of jurors

Although we should regard any attempt to re-introduce special juries for fraud trials as impracticable, we should like to see whatever is possible done to improve the quality of individual jurors. Some judges already adopt a practice of explaining to prospective jurors the nature

of the case they will have to try and invite any who feel unequal to the task of dealing with the documents and figures involved to stand down, assuring them that they would serve the public equally well by sitting on another case. This is surely a sensible practice, although its legality and the best method of giving effect to it may need further consideration.

One advantage claimed for assessors is that they would be readier than juries to ask questions of counsel or witnesses, thereby implying scepticism as to an area of evidence or a line of cross-examination. This enables counsel to justify his point or withdraw it, with potential saving of time and money. We see no reason why, with the encouragement of the judge, the same result should not be achieved with a jury. All it would require is an opening direction in some such terms as the following:

> 'This is a complex case and will take some time to unravel before you. Do not jump to conclusions early on the evidence; remember you will have to reach your verdict upon the basis of all the evidence in the case. However, since the case is complex and we do not want to waste time, it would be of the greatest assistance, if one or all of you have questions about the evidence, particularly after discussions amongst all of you in the privacy of your room during a recess, you would put these questions into writing. You will quickly see, in the course of the trial, the way such matters are conducted, and how evidence is pieced together to form a picture that may answer the questions arising in your mind as you hear the beginning or the middle or any area of the case. However, do not feel any hesitation in asking questions if you require assistance.'

We believe that some such direction would provoke a reaction from a jury sufficient to give intelligent counsel enough clues for justification or retreat on questions put to him by the jury. It is within our experience that where a jury, or indeed a single juror, has taken the initiative to ask a question, it has had a significant impact upon the course of the trial. Theneed is to encourage juries to act more efficiently in this respect.

Selection of judges for the trial of fraud cases

We think that the selection of the judges who are to try fraud cases is something which requires greater consideration than it appears to

have received. There can be little doubt that some of the judges who have had to conduct such trials in recent years have not had the necessary experience or ability. There should be much greater readiness to reserve such cases to High Court judges, and we suggest that greater use should be made of the Commercial Judges. The much heralded flexibility in the use of judge power, to which the Beeching Royal Commission paid such attention, has too often resulted in the High Court judges taking the shorter and simpler cases, whereas the reverse should obviously be the rule. It is said that with the pressure of business the High Court judges cannot spare the time for long trials. We do not believe that this is an insurmountable objection because, as we have already indicated, the fact that a long trial may be anticipated is known well in advance, and the allocation of the judge should not cause difficulty. Further, if it is right that the judge ata fraud trial should be in a position to take firm control over the course of the trial, it would clearly be preferable for the guidelines to be set by High Court judges. Where cases are tried by circuit judges, we believe they should be drawn from a panel of judges specially nominated for this purpose by the Lord Chancellor.

THE TRIAL

In R. v. Simmonds (1967) 51 CAR 316, which was a trial then unprecedented in its length save for the Tichborne case, the now familiar problems arose. This led the Court of Appeal to lay down guidelines for the trial of long fraud cases. The essential guidelines can be extracted from the judgment of the court, delivered by Fenton Atkinson J., as follows:

(a) The prosecution should present a relatively small series of substantial counts and avoid conspiracy where possible. (p.323)

(b) Prosecutions should be presented as simply as possible (p.324)

(c) Prosecution counsel should be instructed as early as possible in the proceedings and before the preparation of the schedules which set the pattern of the case. (p.324/325)

(d) The trial judge should be given a proper opportunity to consider the papers before the pre-trial review. (p.325)

(e) The trial judge should be given copies of the prosecution speech and a copy of defence submissions made at any committal proceedings. (p.325)

(f) The judge has a duty to consider the indictment with the length and complexity of the trial in mind, and if necessary to ask the prosecution to recast its case. (p.325/326)

(g) Evidence in chief of interviews should be summarised where possible. The defence should continue to be provided with full notes. (p.326)

(h) A general injunction to the prosecution to prune material. (p.326)

(i) A general injunction to the defence not to prolong cases unnecessarily. (p.326)

(j) In the unusual circumstances of this case, the course adopted of splitting up the summing up and the return of verdicts dealing with different parts of the case in sequence was justified. (p.329)

Unfortunately, the guidelines laid down in Simmonds, with which our recommendations coincide, have not been followed as they ought to be.

In R. v. Landy (1981) 72 CAR 237, the Court of Appeal found itself having to repeat the directions given in Simmonds. Lawton L.J. made it clear that:

(1) The judge should have the case papers well in advance of the pre-trial review. (p.243)

(2) If the judge does not have the time fully to absorb the papers, then he should adjourn the review. (p.243)

(3) Particulars of the indictment should be given:
  (a) so that the judge and defendant may know precisely from the indictment itself the nature of the prosecution's case; and
  (b) so as to prevent a shift of ground during the trial. (p.244)

(4) Prolixity in submissions and speeches should be avoided. (p.245)

(5) The summing up should be 'clear, concise and intelligible. If it is overloaded with detail, whether of fact or law, and follows no obvious plan, it will not have any of the attributes it should have'. (p.249)

It is lamentable that the guidelines in Simmonds have not been followed, and that further guidance had to be given in Landy in 1981. We firmly believe that if the pre-trial procedure that we recommend were followed, and trial judges observed the guidelines laid down in Simmonds and Landy, then the proceedings would be much simplified, and the jury would have far less difficulty in following the progress of the trial.

There is a tendency to believe that a court is not working if it is not actually sitting. However, it sometimes becomes clear in the course of a trial that many days could be saved if only prosecution and defence counsel were given an opportunity to discuss and agree matters of law or matters of fact and schedules of documents. In such cases the judge should use his power to suspend the sitting for a day or even longer if he feels that this would be helpful. Counsel and solicitors should then receive their daily fees in exactly the same way as they would if the court was sitting. Juries, we are sure, would understand the value of such a procedure, and indeed would no doubt be grateful to have a day or two to return to their normal lives. It may well be that as defendants come to understand what is going on in court, they may at some stage in the trial be prepared to make admissions they would not have made earlier. Anything that can be done to shorten court time should be regarded as a bonus, and the judge should approach any request by counsel for an adjournment with sympathetic understanding. If he sees that there is a possibility that agreement could, or indeed should, be reached on various matters, then he should endeavour to initiate this so long as he takes care not to be oppressive to the defence.

At the end of the prosecution case, it is open to the prosecution in the first instance to indicate if it feels that certain counts in the indictment are not made out on the evidence. This is also, of course, the time for the defence to submit that there is no case to answer, either on the whole case, or on particular counts. Too often fraud trials are allowed to proceed on the whole indictment even though it has become clear that the actual starting point of the fraud is in fact months or even years after the first date set out in the indictment. The end of the prosecution case ought to be the time for a fundamental review of the evidence in the interests not only of justice but of the saving of time.

It may by that stage be apparent that the offence is less serious than it appeared to be at the start of the trial. It is plainly wrong that a trial should be prolonged simply because a firm decision is not taken to restrict the period covered by the indictment, particularly after it has become clear that the sentence is likely to be a comparatively light one.

It seems hardly necessary to say that counsel engaged in fraud trials should keep up to date with changes in the law and relevant commercial practices. Most professional people, be they doctors, scientists, sales managers or accountants, have no hesitation in admitting that it is virtually impossible for a busy practitioner to keep up with new ideas, new law or new aspects of technology. The Law Society provides refresher courses for those interested in particular aspects of the law, but the Bar (apart from the Family Law Bar Association) does not. As the work in the criminal courts increases, as it has done in recent years, there would surely be sufficient barristers to support such courses at the required standard if they were available. It is accepted that the judicial seminar is here to stay and it may well be that a special seminar for judges likely to be concerned with fraud trials would be useful.

SENTENCING, DISQUALIFICATION AND COMPENSATION ORDERS

The aim in sentencing those convicted of fraud must be to protect the public and to punish the wrongdoer. As we have already indicated, frauds can do considerable harm to the economic structure, they may conceal the 'laundering' of money obtained through other criminal activities, and indeed can do vast harm to the individual who has lost his savings through the fraudulent behaviour of another. All frauds are premeditated. So long as those guilty of fraud receive light prison sentences, fraud is worthwhile. White-collar crime should be treated in the same way as other crime. It is remarkable that sentences of imprisonment for fraudulent trading can be very light compared, say, with prison sentences passed for minor offences such as fraud on the DHSS.

It is rare that sentences of imprisonment for fraud are of more than two years duration. Frequently, suspended sentences are passed. A prison sentence, particularly where it is combined with a fine, compensation, or the payment of the prosecution and legal aid costs, can appropriately be suspended either wholly or in part. But the deterrent value of a suspended sentence is obviated in the case of serious frauds by the fact that no sentence of imprisonment for up to two years can be suspended

for a period of more than two years. In this field there would be considerable merit in being able to suspend or partially suspend a prison sentence for, say, up to 10 years, as a deterrent to persons contemplating setting up other businesses within a few years. Such offenders frequently repeat the pattern of business activity which led to their offences, and there is a real need to discourage this.

Disqualification orders

Disqualification from holding office as a director, or being concerned in the management of limited companies under section 188 of the Companies Act 1948 (as amended by section 93 of the Companies Act 1981) does not go far enough in disqualifying fraudulent persons. What is needed is a wider power which should attach to any conviction for serious fraud. This should empower the court to impose disabilities similar to those suffered by an undischarged bankrupt by virtue of section 155 of the Bankruptcy Act 1914. The court should also be able to prohibit such a person from acting as a liquidator or assisting in a liquidation. We think there should be a central public register of all persons so disqualified.

We would support the proposals of the Review Committee on Insolvency Law and Practice under the chairmanship of Sir Kenneth Cork, set out in paragraph 4 of the paper, A Revised Framework for Insolvency Law, which has been presented to Parliament.

Compensation and forfeiture orders

The problem of forfeiture orders was highlighted by a case which came to be known as Operation Julie, which took place in 1978. This concerned the manufacture and selling of a drug known as LSD. The offenders made vast profits, said to be in the region of £750,000, as a result of this illegal manufacture. The trial judge made forfeiture orders against them. On appeal to the House of Lords (R. v. Cuthbertson (1981) AC 470) it was held that there was no jurisdiction to make forfeiture orders, since the conspiracies to which the defendants had pleaded guilty were not 'offences under the Act' within the meaning of section 27 (1) of the Misuse of Drugs Act 1971, as they were not offences defined by any specific provision of the Act. Moreover, conspiracy in its legal nature did not involve any dealings by the offenders with tangible things

as envisaged by section 27 (1). It was also held that there is no jurisdiction to forfeit tangible things situated abroad. In his judgment Lord Diplock said:

> 'Where it is possible to identify something tangible that can fairly be said to relate to any such transaction such as the drugs involved, apparatus for taking them, vehicles used for transporting them, or cash ready to be, or having just been, handed over for them, then if it is desired to forfeit it, the transaction must be made the subject of a charge of the substantive offence. There does not seem to me to be anything unreasonable in requiring this to be done. Forfeiture is a penalty; justice requires that it should not be imposed by a court in the absence of a finding, or an admission of guilt.'

This problem is discussed in the report of Sir Derek Hodgson's Committee on The Profits of Crime and their Recovery. The Committee said:

> '24. In rare cases it is necessary to have a procedure for seizing and forfeiting property, though its owner has not been convicted of an offence. The legality of such forfeitures can now usually be tested in condemnation or forfeiture proceedings. Owners of such property should, however, always have the right to insist that they stand trial before suffering the loss of their goods.
>
> 25. Apart from the cases referred to in 24 above, forfeiture should relate only to offences of which the defendant was convicted or asked to be taken into consideration.
>
> 26. Where the purpose of forfeiture is a cumulative penalty (for instance, where a get-away car is forfeited), and not to take dangerous or prohibited goods out of circulation, consideration should be given to allowing the defendant to pay a pecuniary penalty commensurate with the value of goods and effects, in effect to buy them back.
>
> 27. The broad power of forfeiture in section 43 of the Powers of Criminal Courts Act 1973 should extend to any property of the defendant which has been lawfully seized at any time by the police or other authorities. This should replace the present requirement that only property in the possession or control of the defendant at the time of his arrest can be forfeited.'

We support these recommendations. It also seems to us that the recommendations in regard to pre-trial restraint recommended by the Hodgson Committee serve a most useful purpose. There will also be cases where it would be appropriate to order compensation out of funds which are in the possession

of the defendant, but which bear no relation to the actual fraud that has been charged. The judge in this instance is under the same obligation to make sure that the funds exist, and that it is not merely a device to try and reduce a prison sentence. Indeed, in appropriate cases, there is no reason why a prison sentence should not be passed, as well as a compensation order made.

COMPOUNDING PROCEEDINGS

As we have already mentioned, the Commissioners of Customs and Excise have power to mitigate penalties and compound proceedings under section 152 of the Customs and Excise Management Act 1979, which is in the following terms:

152. The Commissioners may, as they see fit

(a) stay, sist or compound any proceedings for an offence or for the condemnation of anything being forfeited under the Customs and Excise Acts; or

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; or

(c) after judgment, mitigate or remit any pecuniary penalty imposed under those Acts; or

(d) order any person who has been imprisoned to be discharged before the expiration of his term of imprisonment, being a person imprisoned for any offence under those Acts or in respect of the non-payment of a penalty or other sum adjudged to be paid or awarded in relation to such an offence or in respect of the default of a sufficient distress to satisfy such a sum;

but paragraph (a) above shall not apply to proceedings on indictment in Scotland.

The Inland Revenue have a corresponding power under section 102 of the Taxes Management Act 1970, which does not, however, include the power to order a person imprisoned to be released.

The Hodgson Committee on The Profits of Crime and their Recovery has drawn attention to the value of the power to compound -

> 'The power of the Commissioners to order, by executive action, the discharge of a prisoner is, we believe, unique in our law and rarely used. However, the extent to which the other powers are used is very considerable. In some 90 per cent of VAT fraud cases the Commissioners offer to compound a penalty, that is to agree not to prosecute a person against whom they believe they have sufficient evidence in exchange for payment of the tax due together with a variable penalty. The use of compounding by the Commissioners has grown dramatically since the 1950s, when it was virtually confined to passenger baggage offences. The Commissioners sometimes consider compounding when the unpaid tax is very large indeed. In 1981, in an operation called 'Nudger', a VAT fraud involving £2,700,000 was compounded and criminal proceedings stayed.
>
> Compounding offences by the board is also widespread. It is quite normal for compounding to take place after a tax-payer has sworn a statement as to his true earnings or profits and, other than in very serious cases, only if a sworn statement proves to be incorrect, is there a prosecution. To a limited extent settlements are negotiable and a penalty above the payment of the actual tax outstanding, although often substantial,is rarely the maximum which could have been levied.
>
> This way of treating people who have offended against the criminal law has attracted judicial praise for its efficiency and cost effectiveness, but the fact that offenders in most cases remain anonymous has attracted criticism. in 1983 the Keith Committee on the enforcement powers of revenue departments recommended that although the tax authorities should be able to compound or make settlements, the names of the persons concerned should be publicised, except where there had been a full, spontaneous voluntary disclosure.
>
> The way in which revenue offences are dealt with without recourse to the courts suggests that similar advantages might be obtained if the same sort of administrative actions were possible in the case of a wider range of other offences. But, in any event, it certainly suggests that there would be nothing wrong in principle, or unacceptable in practice, if redress by the courts begins to take precedence over punishment in cases of non-victim offences. Revenue offences are often of substantially greater criminality than those regularly prosecuted in the criminal courts.'

However anomalous these powers may at first sight appear, we agree that they should be retained. We cannot, however, support the power of the Commissioners of Customs and Excise to order the discharge of a person imprisoned by order of a competent court, and we cannot believe that such a power would be conferred by Parliament today (the power, of course, derives from much earlier legislation than the Act of 1979). We accordingly think that paragraph (d) of section 152 should be repealed.

CONCLUSIONS

Our principal conclusion is that trial by jury should be preserved for all fraud cases including the most serious ones. We should be opposed to trial by a judge sitting with assessors and even more strongly to trial by judge alone. We accept that frauds are usually, though by no means always, more complicated to present to a jury than other cases. But there is in our view no compelling reason why the defendant in such a case should be deprived of his fundamental right to be tried by a jury.

If more frauds are to be prosecuted to a successful conclusion and trials are to be simplified and their length reduced, the remedy lies in other directions. The investigative procedures should be improved. The issues should be clarified before the trial and the case properly presented by the prosecution. The judge chosen to try the case should be either a High Court judge, or a circuit judge selected from a panel of those experienced in fraud trials. The trial judge should take control from the earliest possible moment so that issues can be simplified and documents and evidence agreed whenever possible between counsel who are actually to appear at the trial. By these means it should be possible to reduce the length of the trial to what is reasonable, and achieve justice for both prosecution and defence.

Our detailed recommendations may be summarised as follows:

(1) There is a real need for the adoption in the commercial world of a more responsible approach to the prevention of fraud. (page 1)

(2) No attempt should be made to define fraud cases by reference to a list of specific offences or subjects. (page 3)

(3) A more forceful policy should be developed in regard to the prosecution of fraud cases. There ought to be a greater readiness to prosecute commercial frauds notwithstanding all the difficulties involved in the prosecution of the case and the conduct of the trial. (page 3)

(4) We hope that further consideration will be given, preferably by the Law Commission, to the law relating to the extra-territorial extent of the criminal law in its application to conspiracy to defraud. (page 7)

(5) There is an urgent need for speedier and more effective collaboration in communication of accurate intelligence between diffferent countries. (page 7)

(6) The law should be amended so as to make it easier to admit evidence of foreign records and statements taken outside the jurisdiction. (page 7)

(7) It is important to reduce the present delay in initiating the investigation of fraud, and the resulting delay between the actual fraud and its prosecution. (page 8)

(8) The United States practice of co-ordinating the efforts of a number of specialist agencies is commended. It is to be hoped that the proposed Fraud Investigation Group represents a step in this direction. (page 8)

(9) We should like to see more young lawyers and accountants introduced into the departments on a short-term basis, as happens in the United States. (page 9)

(10) Forensic scientific work should be carried out in closer contact with the universities to maximise facilities for both prosecution and defence. (page 9)

(11) Police officers engaged in the investigation of complex fraud cases should be given better training, be backed by greater financial resources, and should be able to work more effectively over existing police force boundaries. They should be retained for long enough to develop and make full use of their expertise. (page 9)

(12) The material to be used at a fraud trial should be prepared in such a way as to ensure that it is as intelligible as the nature of the case permits. Training should be given to all investigators, and the help of graphic designers and other experts made available. (page 10)

(13) Counsel who is to conduct the prosecution should be consulted as early as possible so that he may guide the form of the final investigations and documentation. (page 10)

(14) Counsel should be consulted before charges are finally framed, so that clear decisions can be made as to which defendants are to be prosecuted and on what charges. The indictment can then be drawn so as to ensure that if the defendant or defendants are found guilty, appropriate orders as to sentence, compensation, forfeiture, and costs can be made. Alternatively, if administrative action is being considered, the same considerations apply. (page 11/12)

(15) A full pleading system similar to that in civil trials would be wrong in principle, and would be difficult to enforce effectively against a defendant. (page 14)

(16) If committal proceedings were to be abolished, as has been suggested in some quarters, a new procedure should be adopted whereby the trial judge should handle all matters arising after the delivery of the indictment or summons.(page 15)

(17) If committal proceedings are retained, the judge who is to try the case should be designated as soon as possible afterwards in order that he may take charge of all the pre-trial proceedings. (page 16)

(18) There should be a new approach to the problem of pre-trial reviews, which should be radically strengthened with a view to shortening the trial. The review should be conducted by the trial judge and attended by the leading counsel (whether or not Queen's Counsel) who will represent the parties at the trial. (page 16)

(19) If pre-trial reviews are to be effective, it must be made possible for counsel to attend. The importance of the pre-trial review should be marked by proper remuneration to counsel and solicitors, and we suggest that the brief fee, or a high proportion of it, be paid at that stage. (page 17)

(20) The judge must be given adequate reading days before the pre-trial review. (page 17)

(21) The prosecution, possibly before committal and certainly before pre-trial review, should serve upon the defence a list of facts which it is thought likely the defence should be able to admit under section 10 of the Criminal Justice Act 1967. This could avoid the expenditure of time and effort in order to prove facts that will not eventually be in dispute. (page 18)

(22) Proper consideration should be given in legal aid cases to the need for the defence to use accountants and other specialists in appropriate cases. (page 18)

(23) Preliminary work by solicitors and expert witnesses should be acknowledged by adequate payment. (page 18)

(24) A copy of the prosecution speech should be delivered one week before the pre-trial review, and should deal with all the essential facts of the case, their sources and the propositions of law relied on. (page 20)

(25) The defence should be allowed to deliver interrogatories to the prosecution, provided they are directed to essential elements in the case. (page 20)

(26) We do not think there should be any derogation from an accused person's right to trial by jury in a fraud case. Any such change would have to be justified by compelling reasons and we do not think that these can be shown to exist. (page 22)

(27) We think that the use of special juries as an alternative to the present system would be impracticable. (page 23)

(28) We are opposed to the use of assessors in place of juries. We doubt whether it would be possible to provide any acceptable definition of cases which were suitable for trial with assessors and the decision whether or not to employ assessors would have to be left to the judge on the pre-trial review. If he decided in favour of assessors, this would inevitably appear unjust to a defendant who had hoped for trial by jury. (page 26)

(29) The use of assessors would lead to the application of different standards from those employed by juries. (page 27)

(30) The cost of employing assessors would be considerable although not insuperable. The quality of the assessors would depend to some extent on their remuneration, although we do not think it necessary that assessors should be drawn only from the ranks of professional people still in practice. (page 27)

(31) We do not favour trial by judge alone for fraud cases, even if the accused so elects. We think that to give the court power to order trial by judge alone against the wishes of the accused would be wrong and unacceptable to public opinion. (page 28)

(32) Trial by three judges would be preferable to trial by a single judge but would be open to the other objections to trial by judge alone and would be impracticable in terms of the judge-power involved. (page 28)

(33) It might be possible to improve the quality of jurors in fraud cases if the judge were to indicate to prospective jurors the nature of the case and invite them to stand down if they felt unable to deal with the documents and figures involved. (page 28)

(34) The judge should encourage the jury to submit questions through their foreman if they would like issues clarified or require assistance in other respects. (page 29)

(35) There should be a greater readiness to reserve fraud cases to High Court judges (greater use being made of the Commercial judges) and to Circuit judges selected from a panel set up by the Lord Chancellor for that purpose. (page 30)

(36) The guidelines laid down in R. v. Simmonds (1967) 51 CAR 316 and R. v. Landy (1981) 72 CAR 237 as to the proper conduct of fraud trials should be observed by all trial judges. (pages 30 and 31)

(37) Judges should be readier to allow any necessary adjuournment if it becomes apparent in the course of a trial that, even after the most careful pre-trial preparation, discussion between counsel (particularly in the light of a greater understanding of the proceedings by the defendants) an adjournment will substantially shorten the length of the trial. (page 32)

(38) Counsel and solicitors should be paid the same fees for any necessary work during such an adjournment as if the court were sitting. (page 32)

(39) The judge should review the trial at the end of the prosecution case and invite the prosecution to amend or prune the indictment, if appropriate. (page 32)

(40) The Bar should consider providing refresher course dealing with changes in the law, commercial practices and technology. It might be valuable to provide seminars for judges likely to be concerned in fraud trials. (page 33)

(41) So long as offenders receive light sentences, fraud is worthwhile. In too many cases disproportionately light sentences are imposed. Where it is appropriate to pass a suspended or a partially suspended sentence in fraud cases, it should be possible for it to operate for a longer period than at present as a greater protection for the public. (page 33)

(42) The court before whom a person is convicted for fraud should be able to impose limitations upon his ability to obtain credit similar to those provided for by section 155 of the Bankruptcy Act 1914. (page 34)

(43) The power to disqualify a person convicted of fraud under section 188 of the Companies Act 1948 should be extended to prevent him from acting as a liquidator. There should be a central public register of all persons so disqualified. (page 34)

(44) The power of forfeiture in section 43 of the Powers of Criminal Courts Act 1973 should extend to any property of the defendant which has been lawfully seized at any time by the police or other authorities. This should replace the present requirement that only property in the possession or control of the defendant at the time may be forfeited. (page 35)

(45) We support the retention of the powers of the Customs and Excise and the Inland Revenue to compound offences on payment of a penalty, but we think that section 152 (d) of the Customs and Excise Management Act 1979 should be repealed, so as to ensure that a sentence of imprisonment is not capable of being set aside by subsequent administrative action by the Commissioners. (page 37)

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