

“Fraud criminal litigation”

A. Introduction

1. This update covers case law relating to substantive, procedural, evidential and sentencing in fraud criminal proceedings in England.
2. Overall aim - to assist in a practical understanding of fraud litigation

Foreword to “Fraud: A practitioner’s Handbook”¹ by HHJ Alistair McCreath
Resident Judge Southwark Crown Court

“The process of trying fraud is a difficult one for all who are involved in it. The imperative of doing justice to all parties whilst at the same time keeping these trials within limits of time and complexity is not always easy to achieve but is central to the effectiveness of the trial process.

The critical role of knowledgeable lawyers in this field should never be underestimated. This is something recognised in the 2005 Protocol on the Control and Management of Heavy Fraud Cases.

Above all, the part played by such practitioners is hugely valued by the judges who try these cases.

The exercise of good judgment at all stages of the trial process is critical.

Which allegations will the prosecution proceed with?

What evidence will they call in an attempt to prove them?

Where do the real issues in the case lie?

To what extent and in what way will the defence assist in identifying the issues? Which prosecution witnesses need to attend for cross-examination?

What admissions can be made?

What documents should be adduced in evidence?

What disclosure should be made?

What disclosure should be sought?

¹ Adrian Eissa, Colin Wells, Nathaniel Rudolf published by Bloomsbury 2014 ISBN:9781780431376

These questions – and many, many more – have to be faced and answered by the lawyers. If they are not addressed or are addressed but answered wrongly, the risk to the effectiveness of the trial process is likely to be high, in terms of unjustifiable cost and, of obvious importance, in terms of potential injustice.

A good prosecution case can be lost under an avalanche of excess information just as a good defence case can be lost by a failure to insist on the disclosure of material, the relevance of which to the defence case may not always be obvious to the prosecutor.

The ability to exercise good judgment is the product of many factors, one of which, a sound knowledge base, is obvious and important. It is easily said that this kind of knowledge cannot be obtained from a book.....

Practitioners in this field need to access a wide range of material, including sentencing guidelines, Criminal Procedure Rules, provisions under many statutes, codes of practice and guidelines issued in relation to many different aspects of the process..... “

Alistair McCreath
Honorary Recorder of Westminster
Resident Judge, Southwark Crown Court.

August 2014

B.Fraud worldwide

- Extent of fraudulent activity worldwide

The PWC Global Economic Crime Survey 2016 observes²:

“...despite the millions of dollars being spent to tackle it, economic crime remains a persistent and serious issue. It may be slightly down on the last survey, but this type of crime is changing, rather than going away”

- 36% of the 6000 respondent organisations experienced economic crime
- Both developed and emerging markets affected
- **Company detection methods not keeping pace**
- **22% of respondents have never carried out an internal fraud risk assessment. Of those that did, 32% carried out an annual check**
- 32 % of economic crime fell into the cyber-crime category
- Monetisable cybercrime, such as identity and payment card theft, have individuals as victims as opposed to companies, rarely posing an existential threat to companies. However, the more critical economic crime facing organisations is that of international cyber espionage: the theft of critical IP – trade secrets, product information, negotiating strategies, the damage could extend to the billions of dollars, and include destruction of a line of business, a company or even a larger economic ecosystem.
- **Companies are not adequately prepared for or even understand the risks posed by cybercrime.** Only 37% of organisations have a cyber incident response plan
- Engagement of leadership is critical, but less than half of board members request information about their organisation's state of cyber-readiness
- **Almost half the incidents of serious economic crimes were perpetrated by internal parties**
- 22% of respondents experienced actual financial losses of between \$100,000 and \$1 million, 14% of respondents suffered losses of more than \$1 million, and 1% of

² Andrew Gordon PWC Global Forensic Services leader

respondents (primarily from North America and Asia-Pacific) reported losses in excess of \$100 million

- **The true cost of economic crime to the global economy is difficult to estimate, especially considering that actual financial loss is often a small component of the fallout from a serious incident. Respondents consistently noted wider collateral damage including business disruptions, remedial measures, investigative and preventative interventions, regulatory fines, legal fees and damage to morale and reputation as having a significant impact on long-term business performance.**
Employee morale (44%) and reputational harm (32%) cited as top forms of damage
- **44% of organisations believed that local law enforcement was not adequately resourced to investigate crime**
- While some regions reported lower rates of economic crime and the global trend was steady, Africa, Western Europe and the Middle East showed significant increases in the PWC 2016 survey. The main drivers for the high and/or increased reported rates of economic crime in Africa were South Africa (69%, unchanged since 2014), followed by Kenya (61%, up 17% over 2014) and Zambia (61%, up 35% over 2014), while in the Middle East, respondents from Saudi Arabia reported that rates of economic crime more than doubled from 11% in 2014 to 24% in 2016.
- Western Europe was led by France (68%) and the United Kingdom (55%), both increased by 25% relative to 2014.

The significant increase for France was attributable to a jump in external frauds – predominantly cybercrime, which nearly doubled, from 28% in 2014 to 53% in 2016. In the United Kingdom, the increase was driven by an 83% increase in reported cybercrime incidents, relative to 2014.

- At the regional level, while most have experienced increased incidents of cybercrime, Eastern Europe reported a fall of 2% (10% lower than the global average). Cybercrime also does not feature in the top three types of economic crimes experienced in Africa, Asia Pacific and Eastern Europe.

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Business perception of fraud and cyber-crime

The **Kroll Annual Global Fraud and Risk Report 2016/7** (of 17.1.17) highlights the increasing threat and risk that businesses face and perceive from fraudulent activity.

The report is worth a read as it provides useful pointers to the **perception of business leaders towards fraud and cyber crime, identifying current and former employees as the most common perpetrators.**

Six out of ten respondents (60%) who worked for companies that suffered from fraud identified a combination of perpetrators that included current employees, former employees, and third parties. Almost half (49%) said incidents involved all three groups. Junior staff were cited as key perpetrators in two-fifths (39%) of fraud cases, followed by senior or middle management (30%) and freelance or temporary employees (27%). Former employees were also identified as responsible for 27% of incidents reported.

Overall, 44% of respondents reported that insiders were the primary perpetrators of a cyber incident, with former employees the most frequent source of risk (20%), compared to 14% citing freelance or temporary employees and 10% citing permanent employees.

Adding agents or intermediaries to this “insider” group as quasi-employees increases the proportion of executives indicating insiders as the primary perpetrators to a majority, 57%.

Fraud, cyber, and security incidents are now the “new normal” for companies across the world.

The proportion of executives that reported their companies fell victim to fraud in the past year rose significantly to 82%, from 75% in 2015 and 70% in 2013, highlighting the escalating threat to corporate reputation and regulatory compliance.

Cyber incidents were even more commonplace, with 85% of executives surveyed saying their company has suffered a cyber incident over the past 12 months. Over two-thirds (68%) reported the occurrence of at least one security incident over the course of the year.

Every category of fraud has seen a marked increase between 2015 and 2016 as set out in the table below.

Percentage of respondents' companies affected by different types of fraud

Type of Fraud	% of companies in 2016	2015 globally
Theft of physical assets	29%	22%
Vendor, supplier or procurement fraud	26%	17%
Information theft	24%	15%
Management conflict of interest	21%	12%
Regulatory or compliance breach	21%	12%
Internal financial fraud	20%	9%
Misappropriation of company funds	18%	7%
Market collusion	17%	2%
Intellectual property (IP) theft	16%	4%
Corruption and bribery	15%	11%
Money laundering	15%	4%

A broad range of cyber incidents were reported, virus or worm infestation reported by one-third of all companies (33%), followed by an email-based phishing attack (26%).

In the age of big data, nearly a quarter (23%) of respondents said data breaches resulted in loss of customer or employee data, while 19% reported loss of IP, trade secrets, or R&D.

22% suffered data deletion or corruption caused by malware or system issues, and 19% were victims of data deletion by a malicious insider.

Theft or loss of intellectual property was the most common type of security incident, cited by 38% of those who reported a security incident.

While insiders are cited as the main perpetrators of fraud, they are also the most likely to discover it. 44% of respondents said that a recent fraud had been discovered through a whistleblowing programme, and 39% said it had been detected through an internal audit.

Indeed, 76% indicated that their companies have adopted employee-focused anti-fraud measures such as staff training or whistle-blowing hotlines. 82% of respondents have adopted anti-fraud measures focusing on information such as IT security or technical countermeasures, and 79% have implemented physical security measures.

The most commonly reported cyber risk mitigation action was conducting in-house security assessments of data and IT infrastructure, implemented by 76% of survey respondents' companies.

Implementation of employee and partner education programs or a tighter set of policies that help remove avoidable errors and poor business practices are cited as possible remedies.

Fraud in the United Kingdom

Figures and analysis provided by Office for National Statistics ³

- **How is fraud defined and measured?**
- **Fraud involves a person dishonestly and deliberately deceiving a victim for personal gain of property or money.** The first established laws on fraud were set out in the First Statute of Westminster in 1275. While fraud is not a new offence methods of committing it have evolved a great deal over recent times with the rise of new technology, in particular the internet, providing opportunities for fraudsters to commit crime on an industrial scale.
- However, **the fundamental nature of the offence has remained unchanged and the majority of incidents fall under the legal definition of Fraud by false representation** – where a person makes a representation that they know to be untrue or misleading. This covers a broad range of fraudulent activity, **including online** shopping and auction scams (where the victim buys supposedly legitimate goods through an internet site that are fake or fail to be provided), lottery scams (where the potential victim is told they have

³ see

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/overviewoffraudstatistics/yearendingmarch2016#how-is-fraud-defined-and-measured>

won a lottery prize and needs to pay a fee to release the winnings), and inheritance fraud (offering the false promise of an inheritance to trick victims into paying money or sharing bank or credit card details). Most prevalent, however, are banking and payment card frauds which usually involve falsely obtaining personal bank or payment card details in order to carry out fraudulent transactions.

- **Bank and credit account fraud** comprises fraudulent access to bank, building society or credit card accounts or fraudulent use of plastic card details.
- **Advance fee fraud** comprises incidents where the respondent has received a communication soliciting money for a variety of emotive reasons, for example, lottery scams, romance fraud and inheritance fraud.
- **Non-investment fraud** comprises cases where the respondent has generally engaged with the fraudster in some way, usually to make a purchase which is subsequently found to be fraudulent, for example, online shopping, bogus callers, ticketing fraud, phone scams and computer software service fraud.
- **Other fraud** comprises all other types of fraud against individuals not recorded elsewhere, for example, investment fraud or charity fraud.
- **Computer misuse** comprises unauthorised access to personal information (including hacking) comprises offences where the respondent's personal details have been accessed without their permission. Computer virus comprises any computer virus, malware or Distributed Denial of Service (DDoS) attack which infects the computer or Internet Enabled Device.

What are the long-term trends in fraud?

Similar to other types of crime, trends in the number of offences recorded by the police date back to 1898 and indicate how **fraud offences increased steadily through the 20th century¹**.

Following completion of work to extend the main victimisation module in the **Crime Survey for England and Wales (CSEW)⁴** to cover fraud and computer misuse, first estimates have been

⁴ The Crime Survey for England and Wales (CSEW) is a household survey, and as such, information collected on fraud offences only relate to the resident adult population. Fraud against businesses is not covered by the CSEW. In addition, no information about fraud against those under 16 years of age is collected.

The CSEW can, however, identify fraud offences which have not come to the attention of the police for whatever reason (for example, where there is not enough actionable intelligence for the offence to be referred to NFIB).

released as experimental statistics⁴ as part of the quarterly bulletin 'Crime in England and Wales, year ending March 2016'. These estimates indicated 5.8 million incidents of fraud and computer misuse were experienced by adults aged 16 and over in England and Wales for the year ending March 2016. Fraud accounted for almost two-thirds of this estimated total (3.8 million offences) with the majority of these relating to bank and credit account fraud – that is, fraudulent access to bank, building society or credit card accounts or fraudulent use of plastic card details (2.5 million incidents). These initial estimates are based on responses to questions that were only included in the second half of the survey year (between October 2015 and March 2016) (figures for the year ending December 2016 are cited below).

Crime Survey for England and Wales fraud and computer misuse – numbers of incidents for year ending December 2016 (Experimental Statistics)^{1,2}

England and Wales	Adults aged 16 and over
Offence group	Number of incidents (thousands)
Fraud	3,480
Bank and credit account fraud	2,454
Non-investment fraud	827
Advance fee fraud	102
Other fraud	97
Computer misuse	1,917
Computer virus	1,275
Unauthorised access to personal information (including hacking)	642
Unweighted base - number of adults	17,500

Source: Crime Survey for England and Wales, Office for National Statistics

The first full year-on-year comparisons will be available in January 2018, following which trends in the data will begin to emerge.

In the meantime, one of the most reliable indications of trends in fraud offences experienced by the household population currently available is sourced from a separate module of questions on plastic card fraud⁵ first added to the survey in the year ending March 2006. Figure 1 shows **steady year-on-year increases in estimates of plastic card fraud, with levels peaking around 2008 to 2010, followed by declines coinciding with the introduction of EMV (EuroPay, MasterCard & Visa) chip card technology in a number of countries around the world.** While data from these questions provide a useful indication of whether an individual has been a victim of plastic card fraud, they do not provide information on the number of times this occurred or the scale of any loss that may have been experienced. However, the latest finding that 4.7% of plastic card owners were victims of card fraud in the year ending March 2016 is closely aligned to findings from the new CSEW experimental statistics which indicated 4.5% of adults to have been a victim of bank and credit account fraud in the last year.

What is known about the nature and circumstances of UK fraud?

Analysis of the Crime Survey for England and Wales (CSEW) experimental statistics on fraud and computer misuse revealed additional information about the nature of such incidents:

- **The large majority of victims of fraud had been a victim only once (84%),** although repeat victimisation (within the same 12 month crime reference period) was more common among victims of bank and credit account fraud (14%) than other types of fraud.
- **Almost two-thirds of fraud incidents involved initial loss of money or goods to the victim (62%), independent of any reimbursement received¹.** This equates to an estimated 2.3 million offences, compared with 1.4 million incidents of fraud involving no loss.
- **Victims received a full reimbursement in 43% of fraud incidents (1.6 million), typically from their financial provider.** In 690,000 cases, the victim received no or only partial reimbursement
- **Where money was taken or stolen from the victim, in just under two-thirds of incidents the victim lost less than £250 (64%)**
- Incidents of bank and credit account fraud were more likely to result in initial loss to the victim (70%, equivalent to 1.7 million) than other types of fraud. In the majority of these incidents, the victim received a full reimbursement (84%).
- **In 49% of non-investment frauds (such as fraud related to online shopping scams or fraudulent computer service calls) and 76% of all other frauds (for example, lottery scams,**

pyramid or Ponzi schemes² or charity fraud) there was no loss to the victim. This compares to 30% of incidents of bank and credit account fraud where no loss was suffered.

- **With regard to computer misuse, 22% of incidents involved loss of money or goods, all relating to computer viruses (442,000 incidents)³.**
- The extent of cyber crimes⁴ varied by type of offence. As expected, almost all computer misuse offences (97%) involved the use of the internet in some way (compared to 3% where the internet was not involved), while it was reported to have been involved in less than half of all bank and credit account frauds (43%)
- **Among cyber crimes, bank and credit account frauds were more likely to involve the use of the internet in some way (56%) than non-investment frauds (40%) or advance fee frauds (4%).**

Research by the City of London Corporation⁵ using Action Fraud data⁶ found that the level of cyber involvement varied considerably according to the specific type of fraud. For example, within advance fee payment fraud the first contact method for dating scams suggested 88% cyber involvement, while lottery scams suggested only 8%. They also found that cyber-enabled⁷ frauds typically involved a greater financial loss than cyber-dependent frauds^{8,9}.

Analysis of the CSEW experimental statistics also revealed that **only around one-fifth of victims of fraud report the incident to either the police or Action Fraud.**

Compared with the much higher estimates from the CSEW, offences reported to Action Fraud are thus likely to represent the more serious end of offending as these are the cases that victims are most likely to report. For instance, in cases **where the scale of financial loss or emotional impact on the victim is greater, they are more likely to report the offence.** The City of London Corporation research mentioned previously found that the types of fraud with the most impact on victims were pyramid or Ponzi schemes, followed by dishonestly retaining a wrongful credit¹⁰. By comparison, offline retail fraud¹¹ was identified as having the lowest impact on victims. In contrast, the profile of cases covered by the CSEW will cover the full spectrum of harms, though those at the least harmful lower end will tend to dominate.

Computer Misuse Act offences¹² and bank and payment card fraud dominated CSEW estimates. For example, **bank and credit industry fraud made up over 40% of total fraud and computer misuse incidents** in the CSEW experimental data, compared with around 10% of total incidents from the latest Action Fraud data. In contrast, well over one-third (42%) of Action Fraud offences were accounted for by non-investment frauds (such as fraudulent sales, bogus callers, ticketing fraud and computer software service fraud), and in particular frauds involving online shopping and auctions. This compares with 18% of non-investment frauds identified by the CSEW. Another sizable fraud category highlighted by Action Fraud figures was advance fee payment fraud (such as lottery scams, data scams, and inheritance fraud), which accounted for around

15% of total Action Fraud offences (compared with just 2% of CSEW fraud and computer misuse incidents).

Fraud in UK criminal courts

- The value of alleged fraud reaching UK Courts broke the £1 billion barrier in 2016, due to cases where the value of alleged fraud is £50 million or more. This is the first time since 2011 that alleged losses from fraud has exceeded £1 billion. The KPMG Fraud Barometer (published January 2017) found that despite the volume of alleged fraud dropping by nearly a third from 310 cases to 220, the value was up over 55% on last year's £732 million - this year saw £1,137 million of alleged fraud hitting UK courts. Consequently, the average value of fraud has more than doubled to £5.2 million from £2.4 million. In addition, Fraud against businesses was up seven-fold this year with internal fraud committed by employees and management the most common type of fraud to hit businesses. In terms of cyber crime 2016 saw the largest cyber fraud since 2008, leading to losses of £113 million.

Police perception of Fraud in the UK

The BBC website ran a piece on 19.1.17 commenting on the Crime Survey figures, containing the following :

There were an estimated 3.6 million cases of fraud and two million computer misuse offences in a year, according to The Crime Survey for England and Wales which included the offences for the first time in its annual report, which covered the year to September 2016.

'Crime has changed'

John Flatley, from the Office for National Statistics, said:

"When the crime survey started [35 years ago], fraud was not considered a significant threat and the internet had yet to be invented.

"Today's figures demonstrate how crime has changed, with fraud now the most commonly experienced offence."

Sir Tom Winsor, the Chief Inspector of Constabulary for England and Wales, told the You and Yours programme on BBC Radio 4 that **many frauds went undetected and a great deal never got reported to the police.**

"The amount of fraud that is taking place now is probably in **epidemic proportions**," he added. "The police are having to work very, very hard to keep up with even the ones they know about."

"The **capability at police forces is quite skeletal** and that needs to change and change a great deal."

The National Police Chiefs' Council lead for crime and incident recording, Chief Constable Jeff Farrar, said forces were working with the Home Office, police and crime commissioners, and industry experts to develop new tactics to fight cybercrime.

"The ability to commit crime online demonstrates the need for policing to adapt and transform to tackle these cyber challenges," he said.

Business perception of future threats

Cifas⁵ members expressed what they thought were the biggest internal fraud threats facing their organisations in the future. The key concerns reported were:

- **Greater access and use of portable company devices and personal IT such as laptops, tablets and phones leads to an increased chance of loss, theft or personal misuse.** If devices are not adequately encrypted, the danger of data disclosure is a very real possibility.
- **Increased use of instant messaging platforms.** Some feel that these systems are not being regulated well enough and that staff can share sensitive information more freely.
- **Home working or 'agile working' is becoming more popular** among staff who want more flexibility or where office space is at a premium. As well as increased risk of loss or theft of devices, it also increases the chance that other people close by may be able to access or oversee what they are doing (e.g. if using public Wi-Fi in a coffee shop or working in busy communal areas).

⁵ Not-for-profit membership organisation dedicated to preventing fraud and financial crime

Specific Frauds in the UK

- **State benefit**

The Department for Works and Pension issued on 8.12.16 and 18.5.17 reports estimating fraud and error levels in the benefit system in Great Britain for the financial year 2015/16 and 2016/17.

The main points from the report:

- 1.9% of total benefit expenditure was overpaid due to fraud and error in 2015/16 (up from 1.8% in 2014/15) increasing to 2% in 2016/17
- the estimated value of overpayments is £3.3 billion⁶ in 2015/16 (a rise from the 2014/15 estimated value of £3.0 billion) increasing to £3.5 billion in 2016/17
- the net government loss, after recoveries, is £2.2 billion, or 1.3% of benefit expenditure in 2015/16 increasing to £2.4 billion or 1.4% of benefit expenditure in 2016/17

Tax Credits

HM Revenue & Customs measure fraud across the child and working tax credits population, including estimated fraud favouring the claimant. These are published in annual reports ('Child and Working Tax Credits error and fraud statistics') based on a stratified random sample of cases. For the tax year 2014-5 a random sample of 5000 tax credit cases was undertaken and

⁶ Monetary value for 2015/16 and 2016/17 : Housing Benefit £1,460m increasing to £1,490m; Employment and Support Allowance £450m increasing to £580m; Pension Credit £330m decreasing to £300m; Job Seekers Allowance £100m increasing to £110m; Universal Credit £19m increasing to £70m

the level of error and fraud favouring the tax claimant was around £1.37 billion or 4.8% of finalised tax Credit entitlement from £28.6 billion final entitlement (as reported 7.6.16).

Retail business fraud

The British Retail Consortium Annual Retail Crime Survey 2016⁷ estimated 53 per cent of reported fraud (with a direct cost to the retail sector of £183 million) in the retail industry is cyber-enabled, which represents a total direct cost of around £100 million.

Representing around 15% of the total cost of retail crime, cyber-enabled fraud covers traditional categories of deception (such as scams or other forms of social engineering) which, according to the Government's definition, can be increased in scale through the use of computers or other information and communications technology (ICT). Cyber-crime, by contrast, are crimes (such as hacking to steal data) that can be committed only through ICT. As a conservative first estimate, this latter category represented a direct financial loss to the retail industry of around £36m in 2016.

⁷ Published February 2017 at : http://brc.org.uk/media/116348/10081-brc-retail-crime-survey-2016_all-graphics-latest.pdf

C.Fraud offences under Fraud Act 2006 :

The offence of fraud is laid out in Chapter 35 of The Fraud Act 2006 which came into effect on 15 January 2007 in England and Wales and Northern Ireland:

1. Fraud

(1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offence).

(2) The sections are—

(a) section 2 (fraud by false representation),

(b) section 3 (fraud by failing to disclose information), and

(c) section 4 (fraud by abuse of position).

(3) A person who is guilty of fraud is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine (or to both).

(4) Subsection (3)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.

2. Fraud by false representation

(1) A person is in breach of this section if he—

(a) dishonestly makes a false representation, and

(b) intends, by making the representation— (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if—

(a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or misleading.

(3) “Representation” means any representation as to fact or law, including a representation as to the state of mind of—

(a) the person making the representation, or

(b) any other person.

(4) A representation may be express or implied.

(5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

3. Fraud by failing to disclose information

A person is in breach of this section if he—

(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and

(b) intends, by failing to disclose the information— (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss.

4. Fraud by abuse of position

(1) A person is in breach of this section if he—

(a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

(b) dishonestly abuses that position, and

(c) intends, by means of the abuse of that position— (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss.

(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

D. Case management

1. Case management is an increasingly important consideration for all participants in the criminal justice system. This is particularly important in criminal fraud litigation.
2. The **Leveson Review of 2015** is illustrative of the modern day approach favoured by the English judiciary towards the conduct of criminal litigation.

Introduction to Leveson Review 2015

3. The 140 page **Leveson "Review of Efficiency in Criminal Proceedings"** (January 2015⁸), makes for interesting reading for all criminal practitioners and those involved in the criminal justice system.
4. This section of the presentation considers the practical implications of the Reviews suggested **CJS efficiency recommendations** and the use that can be made in practice as per recent case law : see Court of Appeal decision in **R v Boardman [2015] EWCA Crim 175**.
5. The Review's introductory chapter 1 recognises⁹ that the review was conducted (in 2014) against an **austerity background of decreasing public funding affecting the Courts system, Police, CPS, the National Offender Management Service and Legal Aid Agency**.

⁸ <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

⁹ at page 1 para. 1

6. The terms of reference¹⁰ are set out as streamlining the disposal of criminal cases to **reduce costs** for all public bodies. Emphasising **robust case management** and **improved use of technology** to minimise the number of hearings or, alternatively, conducted (whether by telephone, or internet based video) without requiring the attendance of counsel.

The Review¹¹ does not suggest legislative changes but suggests changes in existing practices with the existing Criminal Procedure Rules, requiring **maximum efficiency** from every CJS participant.

7. The Review¹² clearly states that the Executive is in charge of public funding but recognises that a criminal justice system that is professionally staffed and effective is essential to a democratic society. The importance of quality advocacy being reflected by the Review citing a passage from the judgment in **R v Crawley** [2014] EWCA Crim 1028 :

“The criminal justice system in this country requires the highest quality advocates both to prosecute and to defend those accused of crime... The better the advocates, the easier it is to concentrate on the real issues in the case, the more expeditious the hearing and the better the prospect of true verdicts according to the evidence... We have no doubt that it is critical that there remains a thriving cadre of advocates capable of undertaking all types of publicly funded work, developing their skills from the straightforward work until they are able to undertake the most complex.”

¹⁰ at page 1 para. 2

¹¹ page 2 para. 3

¹² page 4 para. 11

Suggested efficiency improvements

8. The Review makes a number suggested **efficiency improvements**, identifying a clear need for :

- (a) **better, quicker and less costly ways of creating, filing and distributing documents**
- (b) **easier and more flexible ways for all parties to communicate**
- (c) **a reduction in the number of hearings a defendant has to attend.**¹³

9. First : the Review highlights and emphasises the importance of a CJS Common Platform¹⁴.

- “CJS Common Platform” to provide a comprehensive, **online case-management system from point of charge**, the police will make all the relevant documentation available via a digital case file, to which the CPS will be provided access. Case progression will take place online, and all the decisions in the case will be made and communicated online. The parties and participants will electronically file in a digital format their statements, exhibits, lists of previous convictions, correspondence, pre-sentence and other reports, Plea and Case Management Forms (PCMH) forms. Applications and written submissions will be filed online. Paper process will be effectively eliminated.

**THIS IS CURRENTLY WORKING AT CROWN COURT LEVEL
WHERE NEW CASES HAVE BECOME PAPERLESS BEING REPLACED
DIGITIALLY**

- **The Judge/list officer/case progression officer will each be automatically alerted when a new application or submission is received, and he or she will be able to decide how it is to be resolved: by way of an in-court**

¹³ page 5 para. 15

¹⁴ page 6 para. 16-17

hearing, a remote hearing or an electronic exchange of written submissions, with the Judge communicating his or her decision via a written message (including any reasons). This is to be commended to avoid "pointless" mention hearings which waste time and money.¹⁵ **The entirety of the documentation in the case will be filed in an electronic store that will be accessible to those involved in the case whose role entitles them to access the information. The parties will present their cases digitally in court, and it is proposed that the information will be made accessible to the jury (on tablets) in this format.**

- There is recognition¹⁶ that there maybe added cost to Defence lawyers eg where the Defendant cannot access the case papers online and needs a hard copy photocopied. That needs to be recognised in any negotiation as to remuneration.
- Listing will be undertaken by way of a digital diary under the control of the Resident Judge and Listing officer¹⁷

10. Second, "Getting it Right First Time" is noted in Chapter 2 of the Overarching Principles of the Review, as an important issue in efficiency terms. This is particularly important for the Police and Crown Prosecution Service, who are gatekeepers to the CJS, as the Review states:¹⁸

" If they make appropriate charging decisions, based on fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence, considerable delay can be eradicated"

¹⁵ page 6 para. 18

¹⁶ page 7 para. 19

¹⁷ page 7 para. 20

¹⁸ page 9 para.25

With a footnote¹⁹ making the practical observation that : "*It is worth mentioning that this principle applies to decisions whether to proceed by arrest and charge or by voluntary attendance and postal requisition*".

11. On the basis of getting it right first time with proper charges and proportionate disclosure, **the Review observes**,²⁰ that it is "*incumbent on the defence to take proper instructions and progress expeditiously*".

The Review goes on "*Getting it right first time is the absolute priority of any improvement to efficiency*" as the first overarching principle of the efficiency recommendations.

12. Third, the importance of Case Ownership is noted as the second overarching principle of the efficiency recommendations.

- "**Case Ownership:** for each case, in the Police, the CPS and for the defence, to maximise the opportunities for case management, there must be **one person is identified to be responsible for the conduct of the case**."²¹ "In order for case ownership to work in practice, the Review recommends that the Legal Aid Agency should change the definition of 'instructed advocate' to the advocate who conducts the main hearing – usually the trial, but frequently the sentence."²²

13. Fourth, closely allied to case ownership, is the third overarching principle of **direct engagement**.

¹⁹ Footnote 13

²⁰ page 9 para.25

²¹ page 9 para.26

²² page 10 para.31. The Ministry of Justice response to this Case ownership recommendation can be found at https://www.gov.uk/government/news/crime-news-crown-court-fees-to-be-paid-directly-to-trial-advocates?dm_i=4P,3BW0Q,7OWXBG,BWUQG,1. In short, in May 2015 "trial advocates" attending the main hearing in a criminal case will receive the legal aid fee as the Ministry of Justice will be amending the Criminal Legal Aid (Remuneration) Regulations 2013.

- the Criminal Procedure Rules should place a duty of **direct engagement** at the first available opportunity between identified representatives who have case ownership responsibilities.²³This should include communications before any first hearing, with parties positions reduced to writing to avoid any misunderstandings between the parties and there to be a written recording of inter-parties communications. "*There should be an expectation that the identified case representatives will have communicated in advance of the first hearing. If they have not, they should have to explain to the court, at that hearing, why they have failed to do so.*"²⁴
- with a **recommendation**²⁵ that it should be a pre-condition that any practitioner wishing to conduct Crown Court litigation should have access to cjsm.
- with a presumption that interlocutory matters should be completed electronically by written submissions as opposed to a formal court hearing, with written resolution by the court, or to arrange a suitable hearing time online or by telephone. "***The Criminal Procedure Rules (and Practice Directions, as appropriate) should make it clear that there is an obligation on any party to justify the need for an interlocutory hearing to take the place of a formal court hearing with all parties present.***"²⁶

14. Fifth recommendation, relates to a fourth overarching principle of **consistent judicial case management.**²⁷

- robust **judicial case management**, with all parties required to comply with the Criminal Procedure Rules and "***to work to identify the issues in a case to***

²³ page10-11 paras. 33-34

²⁴ page 11 para.34

²⁵ page 11 para.36

²⁶ page 12 para. 37

²⁷ page 12 para. 38

so as to ensure that court time is deployed to maximum efficiency and effectiveness."

15. The Sixth series of efficiency recommendations²⁸ concern the role that information technology can play in reducing the number of actual physical attendances at court by the parties and use of digital evidence.

In terms of recommending the increased use of "remote" hearings the Review identifies eight essential pre-requisites:²⁹

- (1) high quality equipment;
- (2) digital recording and access to the audio and visual archive;
- (3) hearings to be "queued" online;
- (4) involvement of instructed advocate for the substantive hearing;
- (5) video facilities in prisons;
- (6) showing exhibits by video link;
- (7) training in use of the new technologies;
- (8) retention of gravitas of the proceedings, with best practice in conduct of remote hearings included into the CPR and practice directions.

16. With increased utilisation of audio and **video hearings**.³⁰ Provision to be made for locked-down computers linking lawyers with in custody clients by way of internet-based video conferencing. Similar facilities would be of value in the Police station.³¹

17. Courts must ensure ease of use of **digital evidence**.³²

18. Chapter 4 is entitled "**Appropriate allocation; the right cases for the Crown Court**" and examines charging decisions and the sending of too many cases to the Crown Court.

²⁸ see chapter 3 "The Role of IT" at pages 13-19 inclusive

²⁹ pages 14-16 inclusive para. 47

³⁰ page 17 para.49

³¹ page 17 para.50

³² page 17 para. 51

19. Chapter 5³³ deals with the **Magistrates Court**, examining three broad concepts of (1) simplifying cases (2) identifying early guilty pleas (3) smoother case progression; with inefficiencies cited which include (a) failures in the way a case file is constructed, (b) the need to improve Magistrates' expertise on disclosure issues, (c) identification, preparation and prioritisation of guilty plea cases and (d) the rates of effective first hearings in not guilty cases . ³⁴

20. Chapter 6³⁵ deals with **Listing**. The Criminal Practice Direction Amendment Number 2, 2014, [2014] EWCA Crim 1569, sets out in clear terms the purpose, manner and responsibility for the listing of cases in the Magistrates' and Crown Courts:

'Listing is a judicial responsibility and function. The overall purpose is to ensure that, as far as possible, all cases are brought to a hearing or trial in accordance with the interests of justice, that the resources available for criminal justice are deployed as effectively as possible, and that, consistent with the needs of the victims, witnesses of the prosecution and the defence and defendants, cases are heard by an appropriate Judge or bench with the minimum of delay'.

21. To reduce the need for multiple listings, the Review, identified³⁶ five things that need to be achieved:

- (1) greater certainty about disclosure;
- (2) greater liaison between the parties;
- (3) the early Guilty Plea system to be given fresh impetus to identify guilty pleas as early as possible;

³³ pages 27-36

³⁴ pages 27-28 para.86

³⁵ pages 37-45

³⁶ page 40 paras. 138-142

(4) cases to be proactively managed by the CPS, with a single case progression officer;

(5) defendants facing indictable only charges to indicate at the Magistrates Court whether or not they intend to plead guilty.

- **Timing of Guilty plea** : suggestion³⁷ that if there has been a ‘not guilty’ indication at the Magistrates’ Court and a ‘guilty’ plea entered at the first Crown Court hearing, it should be open to the Judge, exercising his discretion, to reduce the credit for that plea, it not having been tendered at the first available opportunity.³⁸

21. Chapter 7 deals with Crown Court pre-trial hearings with recognition of the following :

(a) the importance of the PCMH in terms of case management;³⁹

(b) recommendation⁴⁰ that the LAA should examine a fee mechanism that rewards early significant engagement with the prosecution that results in the more effective and efficient early disposal of cases, including guilty pleas;

(c) there should be one case progression officer, responsible to the Judge whose role will be to ensure that all the participants have complied with judicial orders.⁴¹ The police, CPS and defence practitioners must be held accountable for repeated default. Courts should therefore maintain a record of failures to comply with the Criminal Procedure Rules and insist on a compliance court appearance once a pattern of failure is identified.⁴²

³⁷ page 41 para. 142

³⁸ Now see Sentencing Council Guideline “Reduction in Sentence for a Guilty Plea” effective from 1st June 2017

³⁹ page 49 paras. 177-180

⁴⁰ page 51 para. 190

⁴¹ page 53 para. 195

⁴² page 55 para. 202

22. Chapter 8 deals with Crown Court trial issues. With a number of issues identified and recommendations made:

- the delays caused by late arrival of prisoners from prison, with a need to reconsider the terms of any future contract with prisoner movement providers. They must demand greater efficiency and properly managed performance of the contract.⁴³
- flexible court sitting hours and arrangements as per Maxwell times for long, complex trials.⁴⁴
- in relation to expert evidence the importance of scientifically rigorous accessible forensic evidence. The court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted.⁴⁵ The common law admissibility test remains assisted by the Criminal Procedure Rules (listing those matters which must be covered in the experts' report) and Criminal Practice Directions 33A.4-33A.5 (listing the factors which the court may take into account in determining the reliability of the expert).⁴⁶ Courts must use more frequently their power under Criminal procedure Rules CPR 33.6(2) to direct a discussion between experts to identify areas of agreement and disagreement to include in a Statement of Issues document.⁴⁷ In relation to publicly funded cases a court should be prepared to hear an application for expert evidence and provide a reasoned decision as to whether it is justified. Such a court direction should be regarded by the Legal Aid Agency as strong supporting evidence of a funding application, such that if the LAA refuses funding the LAA must provided full reasons to the court.⁴⁸
- In relation to **opening speeches** the Review notes the following: Criminal Procedure Rules be amended so as to require, immediately following the

⁴³ page 57 para. 210

⁴⁴ pages 59-60 paras. 218-222

⁴⁵ page 60 para. 223

⁴⁶ page 61 para. 227

⁴⁷ page 63 para.236

⁴⁸ page 65 para. 244

prosecution opening, a **public identification by the defence of the issues in the case.**⁴⁹

DEFENCE STILL RARELY PUBLICLY IDENTIFY THE ISSUES IN AN OPENING

- **Judge's directions and summing-up:** "The Judge should devise and put to the jury a series of written factual questions, the answers to which logically lead to an appropriate verdict in the case. Each question should be tailored to the law as the Judge understands it to be and to the issues and evidence in the case".⁵⁰ "These questions – the 'route to verdict' – should be clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached".⁵¹ "These directions, along with the standard generic directions relevant to all criminal trials should be provided before speeches so that advocates can tailor their remarks to the law".⁵² "The Judge should remind the jury of the salient issues in the case and (save in the simplest of cases) the nature of the evidence relevant to each issue. This need be only in summary form."⁵³
- **ROUTES TO VERDICT WRITTEN DIRECTIONS ARE NOW STANDARD. JURY FACTUAL QUESTIONNAIRES ARE RARE.**

⁴⁹ page 73 para. 279

⁵⁰ page 79 para. 307

⁵¹ page 79 para. 308

⁵² page 80 para. 309

⁵³ page 80 para. 310

Case management Case law

23. **R v Boardman** [2015] EWCA Crim 175 Court of Appeal Criminal Division
26th February 2015.

Judgment

President of Queens Bench Division **Sir Brian Leveson** :

[1]. It is beyond argument that there is considerable pressure on all involved in the criminal justice system to maximise the use of limited resources and to ensure that cases are processed as efficiently as possible. The recent Review of Efficiency in Criminal Proceedings makes it clear (at para. 22);

“It is … necessary to ensure that the scarce resources are not wasted or used inefficiently. Demands on public funds must be kept to a minimum while, at the same time, ensuring that the delivery of justice is effective and meets the highest standards that any democratic society is entitled to expect.”

[2]. The Review goes on to deal with the critical importance of the Criminal Procedure Rules (CPR) and the role of the judges in effectively managing the work of the court. It emphasises (at para. 199):

“Whatever we do, we must encourage a reduced tolerance for failure to comply with court directions along with a recognition of the role and responsibilities of the Judge in matters of case management. It cannot be right that a ‘culture of failure’ has developed in the courts, fed by an expectation that deadlines will not be met. If a deadline (e.g. for service of a document(s) or an application) is not met, there must be good reason for it and there must be an expectation that the party which failed to comply can provide that reason. A failure to tackle this culture leads to a general

indifference to rule compliance. Whichever party has failed to comply or failed to meet the deadline, the opponent perceives objection as a waste of time because it will be largely pointless: there is no sanction that can be applied. Perhaps most significantly, it allows cases to ‘drift’, and for further hearings to take place unnecessarily.”

Case example⁵⁴

24. **R v Helps and Jacobs** [2015] unreported Snaresbrook Crown Court March 2015 is an example of case management being used effectively by the defence lawyers to ensure that courts orders were complied with by the prosecution, as a means of ensuring the right to a fair trial was upheld by the trial judge.

⁵⁴ PRINT OFF COPIES OF HHJ KORNER QC RULING

E.Fair trial rights⁵⁵

The right to a fair trial and remedies to ensure a fair trial are being compromised by state driven criminal justice system efficiency initiatives. For example, consider the increasingly diluted protection offered by the abuse of process stay remedy.

Disclosure problems

Court of Appeal guidance in *R v R and others* ⁵⁶

- Sir Brian Leveson gave the lead judgement specifically giving guidance on the proper approach to disclosure and abuse of process as a remedy for non-disclosure

Background

- A fraud prosecution which had been live for 5 years, but in which the indictment had yet to be preferred, was stayed as an abuse of process as a result of disclosure problems under the CPIA 1996. Computers seized contained 7 terabytes of information.

- ⁵⁵ disclosure, right to speedy trial, availability of evidence, rule of law, publicity, and effective participation

⁵⁶ [2015] EWCA Crim 1941 judgment December 21st 2015, reported at Archbold Review issue 1, February 22 2016 as followed in *R v whale and others* [2016] EWCA Crim 742

- Allowing the Prosecution terminatory ruling appeal the Court of Appeal reviewed the disclosure regime as provided for under the section 23 CPIA 1996 Code of Practice, the Attorney-General's Guidelines on Disclosure published in 2000, 2005, 2011 and 2013 and the Protocol following the Gross Review.

Key principles set out by Sir Brian Leveson

- **The prosecution is and must be in the driving seat at the stage of initial disclosure**

*“In order to lead (or drive disclosure, it is essential that the prosecution takes a grip on the case and its disclosure requirements from the outset. To fulfil its duty under section 3, the prosecution must adopt a considered and appropriately resourced approach to giving initial disclosure...and include the overall disclosure strategy, selection of software tools, identifying and isolating material that is subject to legal professional privilege and proposing search terms to be applied. The prosecution must explain what it is doing and what it will not be doing at this stage, ideally in the form of a **Disclosure Management Document**”* (para.34)

- **The prosecution must encourage dialogue and prompt engagement with the defence, with the duty of the defence to engage with the prosecution⁵⁷**

NOTE: Court of Appeal's decision in *DS and TS*⁵⁸ allowing a Prosecution appeal against a first instance stay. The COACD stated that the stay should not have been imposed because (a) the disclosures failures were of limited materiality (b) a fair trial could be had and (c) there had been a lack of proper compliance with the Criminal Procedure Rules by the Defence at an early stage of proceedings.

⁵⁷ the new obligation to “actively assist” has the most potential to impact at the earliest stages, with active participation by the defence in the formulation of appropriate electronic search terms being an obvious area for possible co-operation between parties – actively supported by the courts

⁵⁸ [2015] EWCA Crim 662, [2015] 2 Cr App R 27

- **The prosecution is not required to do the impossible**

"nor should the duty of giving initial disclosure be rendered incapable of fulfillment through the physical impossibility of reading (and scheduling) each and every item of material seized...the prosecution is entitled to use appropriate sampling and search items and its record keeping and scheduling obligations are modified accordingly" (para.36)

- **The process of disclosure should be subject to robust case management by the judge, utilizing the full range of case management powers**

- **Flexibility is critical, disclosure is not a box-ticking exercise**

Judges can adopt and devise a tailored or bespoke approach to disclosure (para.49)

- Prosecution failures, such as ***Boardman* [2015] EWCA Crim 36**⁵⁹, can bring a prosecution summarily to an end but these can only be decided on a case by case basis and it is difficult to generalise as to the circumstances in which they arise (para. 74)

In both *Boardman* and *S(D) and S(T)* it is clear that for a case to be stayed as an abuse of process, (a) the evidence which the prosecution failed to disclose must be material to the case, and (b) the defence must have engaged with the prosecution and the court early in the process, complying properly with the Criminal Procedure and Investigations Act 1996 (CPIA) and the Criminal Procedure Rules. It is clear that the demonstration of reprehensible conduct of the prosecution, even where disciplinary action is taken as a result, is not enough; the defence must have avoided

⁵⁹ [2015] EWCA Crim 175

contributing to the failings.

To have any chance of establishing an abuse of process the defence will therefore be required to engage with the prosecution properly and early. It is by means of active and purposive litigation that a defence team can expose failings of the prosecution to fulfil their duties, and as a result lay the groundwork for a strong abuse application.

Everyone recognises that the Crown Prosecution Service has suffered from devastating cuts in the last six years. However this cannot be an excuse for non-compliance with its duty to take reasonable steps to obtain material under the CPIA and the Attorney General's Guidelines on Disclosure. In a case where a defendant has been prejudiced due to serious prosecution failures, or even bad faith, it is entirely just that a case is stayed as an abuse of process

F. Alternatives to state prosecutions

(1) Private prosecutions

(2) Local authority prosecutions

Appropriate prosecutor :

The Court of Appeal Criminal Division in **R v AB, CD, EF⁶⁰** - judgment 28th April 2017 – considered the appropriate legal body to prosecute a case

Lord Chief Justice Thomas presided over the appeal.

The appellants were charged with the common law offence of Conspiracy to Defraud the Legal Aid Agency with an alleged loss of £4 million to the LAA.

The alleged fraud was investigated by the Counter Fraud Investigation Department of Thurrock Borough Council on behalf of the LAA. The City of London nor Metropolitan Police would not take the case on because of a resources issue. Neither the DPP nor the CPS were asked to consider initiating proceedings. Thurrock Borough Council acted as the prosecution authority under section 222 of the Local Government Act 1972.

The decision to prosecute by Thurrock local authority was challenged at Southwark Crown court.

The appellants argued that the CPS was the appropriate prosecutor not Thurrock Borough Council.

HHJ Grieve QC rejected the challenge

⁶⁰ [2017] EWCA Crim 534

The COACD observed at paragraph 7 judgment that where a Local Authority's power to prosecute under section 222 is in issue the application to the first instance judge is in substance an application for a stay for an abuse of process.

Each case will turn on its own facts. The COACD should be slow to interfere, given the very broad power given to a local authority under section 222.

However, the COACD decided the Council's decision to prosecute fell outside s.222 as it did not promote nor protect the interests of Thurrock inhabitants.

The DPP took over the proceedings.

(3) Deferred Prosecution Agreements

Deferred Prosecution Agreements ('DPAs') became available in the United Kingdom on 24th February 2014; with four being finalised to date.

What Is a Deferred Prosecution Agreement?

Deferred Prosecution Agreements in the UK were designed to be a new tool to tackle economic crime committed by organisations more effectively.

A DPA involves a company reaching an agreement with a prosecutor to settle allegations of economic criminal wrongdoing (for example, bribery or money laundering) without being prosecuted. Instead, an indictment is preferred but then immediately suspended to allow an organisation to comply fully with the terms and conditions of the DPA.

The Test

In deciding whether to enter into a DPA, the prosecutor must apply a two-stage test. The two stages are the evidential stage and the public interest stage.

When considering the public interest stage, the prosecution determines whether the public interest would be served by prosecution or by entering a DPA. The more serious the offence, the more likely a prosecution will be required in the public interest. Indicators of seriousness include not just the value of any gain or loss, but also the risk of harm to the public, unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade. The impact of the offending in other countries, and not just the consequences in the U.K., should be taken into account.

A variety of features may militate towards or away from prosecution, for example:

- whether the company has a history of similar conduct;
- whether the company had been warned before or if the relevant behavior was an isolated incident;
- whether the organisation had an ineffective corporate compliance programme and whether there is a genuinely proactive and effective programme in place now;
- whether the wrongdoing was reported within a reasonable time of the offending conduct coming to light and whether that reporting was full and frank;
- whether there was a genuinely proactive approach adopted by the corporate management team when the offending conduct was brought to their notice

- (such as self-reporting and remedial actions and the compensation of victims); and
- whether the offense was recent in nature, and whether the company is, in its current form, effectively a different body to that which committed the offences.

Full, frank and early self-reporting and full cooperation with the relevant authorities will militate against a prosecution being brought.

The prosecution and organisation must agree to terms which are “fair, reasonable and proportionate.” This will of course vary from case to case and different terms will be appropriate in different circumstances. However typical terms will include:

- the payment of substantial penalties;
- making reparation to victims;
- undertaking reform to prevent that type of conduct occurring again; and
- submitting to regular reviews and monitoring.

Four DPA's

(1) Standard Bank

Some 18 months later, on 30th November 2015, Lord Justice Leveson (as he was then) approved the first agreement between the **Serious Fraud Office and Standard Bank**;

(2) XYZ Ltd

On 8th July 2016 Leveson LJ, sitting as a judge of the Crown Court, approved a deferred prosecution agreement between the **Serious Fraud Office and a company known as XYZ Ltd**, a small to medium sized enterprise company ('SME') which is wholly owned by a parent company, ABC.

Between June 2004 and June 2012, XYZ, through its agents and employees, was involved in what Leveson LJ described as the 'systematic offer and/or

payment of bribes' in order to secure contracts in overseas jurisdictions. Offences preferred in the draft indictment included conspiracy to bribe, and failure to prevent bribery. The company self-reported its wrongdoing following a thorough internal investigation.

As in *SFO v Standard Bank*, Leveson LJ placed particular weight on the company's compliance with the process, including the actions taken to self-report. Of particular significance were the steps that XYZ had taken in the aftermath of the offences, which enabled Leveson LJ to describe the company as a 'culturally different company to that which committed the offences'. Two senior employees had been dismissed and face criminal charges, while relationships with corrupt agents had been terminated. The judge was also at pains to praise the parent company, describing ABC's conduct as 'exemplary', having provided both financial and legal support for its subsidiary. The terms of the DPA included, *inter alia*, disgorgement of £6.2m in gross profits, a financial penalty of £352,000 and terms on co-operation and compliance.

(3) Rolls-Royce PLC

On the 17th January 2017, Sir Brian Leveson concluded the third deferred prosecution agreement, this time an agreement having been reached between the SFO and Rolls-Royce PLC and its associate company, Rolls-Royce Energy Systems. As noted in his judgment, this agreement is to date 'by far, the largest' DPA to have been agreed, costing Rolls-Royce £509,943,399 by way of a disgorgement of profits, financial penalty, and costs.

Facts of Rolls Royce DPA

The DPA concerns 'persistent offending' by Rolls-Royce between 1989 and 2003. The draft indictment contains 12 counts involving conspiracy to corrupt (in Indonesia, Thailand, India, and Russia), false accounting (in India), and failure to prevent bribery (in Indonesia, Nigeria, China, and Malaysia). The offending came to light in early 2012 by way of a number of internet posts, which caused the SFO to seek information from Rolls-Royce. This was

immediately followed by an internal investigation by Rolls-Royce and the subsequent disclosure of information to the SFO.

This investigation and supply of information was described as ‘extraordinary cooperation’. 30 million documents, spanning multiple jurisdictions, business lines, and timelines, were reviewed digitally. The review concluded that the offending was ‘multi-jurisdictional, numerous’ and spread across Rolls-Royce’s business. It involved ‘substantial funds being made available to fund bribe payments’ and showed careful planning. Perhaps most disturbingly, the investigation appeared to disclose that the conduct implicated ‘very senior’ Rolls-Royce employees.

Terms of RR DPA

As has already been noted, the terms of the DPA require a sizeable financial settlement by Rolls-Royce, comprised of £258m in disgorgement of profits, £239m in financial penalty, together with the SFO’s (not inconsiderable) £13m in costs. The terms of the agreement are, however, forward looking in that Rolls-Royce will have to continue a programme of compliance overseen by Lord Gold. In particular, the company must show how it intends to address risk of further offending. The programme will be monitored and enforced by the SFO.

It is clear that although the company has found terms agreeable to the SFO and the court the investigation still continues. The attention however has been to now focus on individuals. There does not exist in the UK a DPA for an individual indicted with economic crime/bribery/corruption. The only way forward for an individual is to rigorously test the evidence, ensure full disclosure and argue the case before a jury.

(4) Tesco Stores Limited

Judicial approval was given to a fourth DPA on 10th April 2017.

In 2014, Tesco Stores Limited (a UK subsidiary of Tesco PLC) gave a false account of its performance. The company admitted deliberately overstating its profits by £326 million after incorrectly booking payments from its suppliers. This led to the Serious Fraud Office (SFO) launching an investigation into Tesco's accounting practices.

As part of the investigations, three former Tesco executives, accused of fraud, are due to stand trial in September 2017.

Due to the live proceedings concerning the three former Tesco executives, reporting restrictions prevent the judgment, the DPA and the statement of facts being published.

[However, it is understand, in various website souces, the following:

1. *Tesco will pay a fine of £129 million.*
2. *Tesco has agreed with the FCA's finding of 'market abuse' in relation to the trading statement which overstated the Group's profits.*
3. *However, there is no admission by Tesco that it or any of its employees committed a criminal offence.*

The Financial Conduct Authority (FCA) has also stated that it is not suggesting that the Tesco board of directors "knew, or could reasonably be expected to have known" that the information in the company's trading statement was false or misleading.

It is not yet fully clear whether the DPA deals with any liability attaching to Tesco PLC or any employee or agent of Tesco PLC or Tesco Stores Limited. Tesco PLC stated that judicial approval of the DPA, and compliance with its terms, will conclude the SFO's investigation into "Tesco". It could be assumed that this refers to the entire group and could suggest that no further action will be taken against Tesco PLC.

As well as the DPA fine, Tesco has also agreed a compensation scheme with the FCA to pay £85 million to investors who were affected by the inflated figures. The fine, compensation payments and costs are set to total £235 million.

The compensation scheme will cover investors who bought shares or bonds in Tesco Stores Limited between 29 August and 19 September

2014. Such purchasers will be entitled to compensation of 24.5p a share plus interest at 1.25% for institutional investors, or 4% per annum for retail investors.

This is the first time that the FCA had used its regulatory power to require a listed company to pay compensation for market abuse.

Some shareholders have brought claims against Tesco in relation to the matter. Most of these have been settled with modest sums.]

(4) Civil recovery : Part 5 POCA

Independent of criminal proceedings Prosecutors can apply under Part 5 POCA for a Civil Recovery Order to recover property obtained by unlawful conduct. These provisions are not intrinsically disproportionate complying with Article 1 of the First Protocol of the European Convention (A1P1).

In **Kalsoom Sanam (formerly Amir) v National Crime Agency**⁶¹ the competing rights of the National Crime Agency to recover property obtained by unlawful conduct under Part 5 POCA as against the property rights of an innocent spouse who would be left with nothing if the order were made, were considered.

A1P1 provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”.

In Sanam the respondent was the wife of man who had committed drug trafficking and money laundering offences in Dubai. Part 5 proceedings have extra territorial reach: if the unlawful conduct relied upon is not only unlawful in the country in which it occurred, but also unlawful in the UK, property obtained as a result of that conduct is recoverable property see section 241 POCA.

The respondent had no knowledge that her husband was engaged in

⁶¹ [2015] EWCA Civ 1234

criminality of any description and genuinely believed that the property (Property A) transferred into her name was purchased with legitimate funds as a wedding gift. Property A was rented out and the rental income it produced was used to help finance the purchase of Property B in joint names with her husband, which in turn was also rented out.

The first instance trial judge found that the respondent; “has done nothing to deserve the situation in which she has found herself. This is not a case of a wife who was happy to live “high on the hog” from the proceeds of crime with no questions asked, turning a blind eye to where the money was coming from. She was a dutiful young woman who entered without question into an arranged marriage and moved to a strange country where she had no friends and family in order to be a mother to her husband's three children by an earlier relationship”.

It was not in dispute that Properties A and B represented property obtained through unlawful conduct and were therefore recoverable property within the meaning of s.304 (1). It was also not in dispute that the effect of a civil recovery order would leave the respondent with no other assets. The court held that none of the various statutory defences within Part 5 were available to the respondent; in summary, she was not a bona fide purchaser for value without notice (s308) since, notwithstanding her obvious and ongoing contribution to family life in other ways, she had not paid for the properties. The statutory defence contained within s. 266 provides the court with a limited discretion not to make a recovery order if certain conditions in s.266 (4) are met and “it

would not be just and equitable “to make a CRO. This includes situations where a respondent has taken steps to his/her detriment. In Sanam however the respondent had not, as a result of acquiring her interest in the properties, taken steps to her detriment which she would not otherwise have taken within the meaning of s.266 (3) (a) and s.266 (4). So despite the view of the first instance judge that if she had an unfettered discretion “there would be much to be said in favour of allowing” the respondent to retain at least some of her interest in the properties, she went on to make the civil recovery order. The judge went on to observe that

“The policy underlying Part 5 of POCA would be frustrated if a CRO were not to be made in a case such as this, even though the impact will be to deprive this most unfortunate lady of the very property that she believed to have been given to her to safeguard her financial position in the event of a divorce from the man she had the great misfortune to marry.”

The judge refused the respondent permission specifically to argue A1P1 on the grounds that she was out of time to do so. The Court of Appeal found that she was wrong to do so and went on to hold that A1P1 applies with equal vigour to Part 5 Proceedings as it does to Part 2 proceedings:

“The overall purpose of both Part 2 and Part 5 is stated in section 2A of POCA as the reduction of crime. As was acknowledged by the Supreme Court R v Waya (at [21]), the legislature has provided the means for that to be achieved by the forfeiture to the state of property obtained through crime.” Para 60

It was argued on behalf of the respondent since she could not bring herself within s. 266(4) of the Act “the question the court has to consider is whether a CRO would further any of the legislative aims of Part 5 of POCA; and, if it would not, then it would be disproportionate and would infringe A1P1. If it would further the aims to some extent, the question to be considered would be whether making a CRO would be proportionate to the legislative aims”.

Having reviewed the authorities, and considered the nature of the interference with the property rights of the respondent resulting from the making of a CRO the Court summarised the effect of AP1:

“For there to be no violation of A1P1 it must be shown that the interference complies with the principle of lawfulness (viz. lawful under domestic law and compatible with the rule of law) and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved. (5) This turns on whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. (6) A fair balance does not exist if the person concerned has to bear an individual and excessive burden (7) in that regard a margin of appreciation is left to the national authorities, and that margin is a wide one in the implementation of social and economic policies. (8) At the domestic level, courts must be similarly circumspect since social and economic policies are properly a responsibility of the legislature and policy making of this nature is amenable to judicial scrutiny only to a

limited degree. (9) The assessment of proportionality requires careful consideration of the particular facts.”

Turning to the facts, the conclusion of the court was that “Despite the sympathy which the situation of [Mrs Sanam] and her little girl inevitably invokes, it must not be overlooked that these two properties were investments, and that she never lived in either of them... and the reality is that she would never have been in a position to enjoy the rentals from either of those properties if her husband had not been a drugs dealer and money launderer”.

“We have no hesitation in rejecting the argument that the result of the social policy of Parliament to require the making of a recovery order in those circumstances is disproportionate and casts an excessive burden on Mrs Sanam when balanced against the public interest in the reduction of crime by the forfeiture of property obtained through criminal conduct”.

G. Appeals

(a) defence appeals

- (i) judicial review eg search warrant cases
- (ii) Court of Appeal Criminal Division

(b) prosecution appeals

- (i) section 58 CJA terminatory rulings appeal
- (ii) AG-References on lenient sentences

H. Sentencing

Fraud, Bribery and Money Laundering offences Sentencing Council Guidelines 2014

A. Introduction

1. The Sentencing Council on 23rd May 2014 published⁶² a guideline covering offences of Fraud, Bribery and Money Laundering⁶³, based upon research and consultation over the period November 2012-September 2013.
2. The Fraud, Bribery and Money Laundering Guideline takes effect on 1 October 2014 to all individual offenders aged 18 and older and to organisations who are sentenced on or after 1st October 2014, regardless of the date of offence. The date of sentence triggers the guideline not the date of offence.
3. The 2014 Guideline must be followed by sentencers “*unless the court is satisfied that it would be contrary to the interests of justice to do so*”.⁶⁴

B. Background

4. A number of points to note in relation to the background of the 2014 Guidelines.

(1) Money Laundering

⁶² In accordance with section 120 of the Coroners and Justice Act 2009.

⁶³ which can be downloaded from the SGC website at : <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm>.

⁶⁴ As per Section 125 (1) of the Coroners and Justice Act 2009

5. It is the first time that there has been a sentencing guideline for Money Laundering. The Sentencing Council recognises that Money Laundering is a frequently encountered offence, an integral part of much serious crime, where the circumstances are extremely variable in relation to both the sums involved and the role of the offender.⁶⁵

(2)Extent of fraud

6. Fraud is ever growing a fact confirmed by Sentencing Council research.⁶⁶
7. In 2012, 17,926 people were sentenced for fraud, a hugely varied offence that can affect individuals, businesses, public money and charities.
8. The national Fraud Authority estimated that fraud related loss to the UK economy was £52 billion⁶⁷ for the financial year 2012/13. This figure includes identified fraud loss (£15.5 billion) and estimated hidden or undetected fraud loss (£36.5 billion).
9. Fraud against individuals cost victims £9.1bn in 2012-3. It includes Ponzi schemes, gangs targeting people using cashpoints, cowboy builders who rip off vulnerable older people, identity fraud and internet offences like phishing, running fake online ticket sites and duping dating site and social media users.

⁶⁵ Points made by the Council of HM Circuit Judges see page 10 of Sentencing Council Fraud, bribery and money laundering offences Response to Consultation document (May 2014)

⁶⁶ See "Sentencing for Fraud – Statutory offences" Sentencing Guidelines Council October 2009 for statutory offences sentenced after 26th October 2009 Available online:

http://sentencingcouncil.judiciary.gov.uk/docs/Research_on_sentencing_online_fraud_offences.pdf.

The 2009 guidelines covered (a) Confidence fraud (b) Possessing, making or supplying articles for use in fraud (c) banking and insurance fraud, and obtaining credit through fraud (d) benefit fraud (e) Revenue fraud (against HM Revenue and Customs). The 2009 guideline did not cover the common law offence of Cheating the Public Revenue or Conspiracy to Defraud.

⁶⁷ National Fraud Authority (June 2013) "Annual Fraud Indicator"

10. Private sector fraud cost business £21.2bn in 2012-3. Examples are employees claiming for bogus expenses, suppliers making fraudulent payment claims, cash for crash scams and other insurance fraud and people falsifying mortgage applications.
11. Fraud targeting public money amounted to £20.6bn in 2012-3. This mainly comprises tax fraud such as income tax evasion and VAT fraud. Other examples are council tax fraud and benefit fraud.
12. Fraud against the not-for-profit sector cost charities £147m in 2012-3. This may take the form of a charity employee diverting donations to their own bank account, someone conning grant funding from a charity on false pretences, or bogus charity collectors.

(3) Impact of fraud

13. Research⁶⁸ commissioned by the Sentencing Council revealed that these crimes can mean far more than just financial loss - even losing quite a small sum can have a big impact on some victims. Individuals may suffer emotionally and psychologically, losing confidence in their ability to manage their financial affairs, as well as finding themselves in financial difficulties and having their credit rating damaged.
14. One of the 2014 Guideline aims therefore is to increase the focus and emphasis on the effects on victims of fraud in the sentencing process.

⁶⁸ Available online:

http://sentencingcouncil.judiciary.gov.uk/docs/Research_on_sentencing_online_fraud_offences.pdf
"Research on Sentencing Online Fraud Offences (Kerr, Owen, McNaughton Nicholls and Button 2013)

15. The previous 2009 guideline⁶⁹ for confidence fraud only refers to the harm to victims as an aggravating factor and the banking and insurance guideline made no reference to the impact the offence may have on either an individual who has had their account or identity compromised or on a corporation that has suffered the loss.

16. The 2014 Guideline instead places victim impact at the centre of considerations of what sentence the offender should get. This may mean higher sentences for some offenders compared to the current guideline, particularly where the financial loss is relatively small but the impact on the victim is high.

17. The 2014 Guideline also aims to ensure that the victim's vulnerability is given due weight. An example would be where the victim is particularly vulnerable due to, for example, age, such as cases where an unscrupulous builder targets an elderly pensioner, convincing them to have unnecessary work done on their home at extortionate costs.

18. The Sentencing Council has also broadened how harm is described in the 2014 guideline so that sentencers are not restricted in what they take into account since harm to fraud victims can be extremely varied. This could include physical harm from 'cash for crash' scams, distress and inconvenience from identity frauds and increased premiums on policyholders by insurance scams.

19. In relation to victim impact Sentencing Council chairman Lord Justice Treacy said:

"Fraudsters are in it to make money, but for their victims it can mean much more than losing money. Our research with victims showed the great impact it can have on them, so the

⁶⁹ See http://sentencingcouncil.judiciary.gov.uk/docs/web_sentencing_for_fraud_statutory_offences.pdf

guideline puts this impact at the centre of considerations of what sentence the offender should get.”

20. Lord Justice Treacy cites⁷⁰ the Sentencing Council research into the impact of online fraud which found:

“A wide range of emotional and psychological impacts were reported including panic, anger, fear, stress, anxiety, self-blame and shame. Self-blame was one of the most pervasive effects of fraud which could damage participants’ opinion of themselves as capable people who could protect themselves from harm. There were participants that reported feeling vulnerable, lonely, violated and depressed and in the most extreme cases suicidal as a result of fraud”

(4) 2009 Guideline

21. The 2014 Guidelines replace the previous fraud guidelines published by the Sentencing Guidelines Council in 2009⁷¹ which grouped fraud types : (i) confidence fraud; (ii) possessing, making or supplying articles for use in frauds; (iii) banking and insurance fraud, obtaining credit through fraud; (iv) benefit fraud; and (v) revenue fraud.

22. The 2014 Guidelines are grouped broadly under the same types of fraud save that confidence, banking and insurance frauds have merged into one combined fraud guideline. The new revenue fraud guideline now includes the common law offence of cheating the public revenue and conspiracy to defraud. Each of the Guidelines applies to sentencing offenders convicted of conspiracy to commit the substantive offence.

(5) Impact, proportionality and consistency

⁷⁰ Foreword to the Sentencing Council “Fraud, bribery and money laundering offences: Response to consultation” May 2014.

⁷¹ See http://sentencingcouncil.judiciary.gov.uk/docs/web_sentencing_for_fraud_statutory_offences.pdf

23. Overall, in developing the 2014 Guidelines the Sentencing Council's stated aim is to

"reflect current sentencing practice and ensure proportionality with other offence types",

Focusing more on the role that the offender played and the impact that the crime had on the victim⁷² than in the 2009 Guidelines. In deciding sentence levels, the Council generally places greater emphasis on the culpability of the offender as opposed to the financial harm caused.

24. The 2014 Guidelines are intended to improve consistency in approach to sentencing fraud, bribery and money laundering offences.

(6)Corporate

25. Guidance for sentencing corporate offenders is included .

However, the 2014 Guidelines are not applicable to parties entering Deferred Prosecution Agreements⁷³but may be used to inform the level of financial penalty imposed that forms part of a DPA.

(7)Research

26. The 2014 Guidelines are based upon research carried out with magistrates, district judges, Crown Court judges and one High Court Judge seeking their views of the 2009 Guidelines, particular

⁷² As per Lord Justice Treacey Chairman of Sentencing Council remarks in Foreword "Fraud, bribery and money laundering offences: Response to consultation" (May 2014).

⁷³ A DPA is an agreement made between a prosecutor and an organisation under which a criminal prosecution is deferred pending compliance with terms and conditions that may include payment of substantial financial penalties; under section 45 of, and Schedule 17 to, the Crime and Courts Act 2013. See "Time to negotiate ?" Nicola Higgins and Quinton Newcomb pages 26-8 Counsel magazine September 2014

fraud offences, money laundering, sentencing starting points and sentencing range.

Step 1 (seriousness) in the sentencing process

27. Sentencers were asked their views on what the most important factors were in assessing the initial seriousness of fraud (at step 1). The following issues were identified by sentencers, covering different fraud offences, as important to assessing the seriousness of the offence:

- Extent of planning and/or organisation, including whether the offence was fraudulent from the outset⁷⁴;
- Value defrauded/loss
 - Some sentencers see this as the main consideration when sentencing financial crime.
 - Some sentencers noted that in confidence fraud offences the value defrauded must be considered relative to the victim's financial circumstances in order to consider the impact on the victim. Hence, a fraud where £1000 was defrauded from someone of limited means was considered as serious as a crime involving £1 million defrauded from a large corporation
 - Some sentencers said that they would consider the value of the loss to include indirect costs⁷⁵ as well as the direct loss
 - Some sentencers said that they would bear in mind the intended rather than actual loss, particularly if there was sufficient evidence for this being greater
 - The level of personal gain was also important for some sentencers

⁷⁴ This was of particular importance in sentencing benefit fraud cases.

⁷⁵ For example if a victim had to spend money restoring or upgrading their internet security this should be considered when calculating the loss they incurred.

- Length of time over which the offence was committed
 - Longer periods of offending increased the harm of the offence and the offender's culpability
- Role of offender
- Abuse of trust
- Single or multiple offences
- Vulnerability of the victim
- Group activity

Step 2 Starting points and ranges

28. The sentencers views were that sentencing levels under the 2009 guidelines were too low for Benefit fraud.
29. In relation to Revenue fraud approximately half of the sentencers felt that they thought that some sentences may be too low if the draft guideline were adopted, particularly fraudulent evasion of VAT. Sentencers specifically mentioned that current sentencing levels⁷⁶for revenue offences were too low and that they would strongly support an increase in these levels.

C. Sentencing approach adopted

30. There are six guidelines within the 2014 guidance for individual offenders:

⁷⁶ The research was carried out between November 2012 and September 2013.

1. Fraud
2. Possessing, making or supplying articles for use in fraud
3. Revenue fraud
4. Benefit fraud
5. Money Laundering
6. Bribery

STEP ONE DETERMINING THE OFFENCE CATEGORY (Culpability and Harm)

Culpability assessment

31. Across the six guidelines the same approach has been taken to assess the culpability of the offender, as part of step one determining the offence category.
32. The court is to assess culpability as high, medium or lesser - a three tier system – based on the role of the offender and the level of planning and sophistication of the offence; with up to 15 factors cited, dependent on the given guideline.⁷⁷
33. Culpability across all six guidelines is assessed at three levels at step one – high, medium or lesser – with a short narrative directing the court to balance the factors where there are characteristics from different levels of culpability to reach a fair assessment of the offender's overall culpability.
34. There will be cross-over between the three levels so that offenders may straddle culpability levels. The Sentencing Council response to consultation,⁷⁸ adopting the language of the Drug Offences Definitive Guideline, observes that
“a leading role is the most serious in terms of culpability and a significant role would be demonstrated by the offender playing a major part in the offence short of being a driving force behind it”.

⁷⁷ See pages 6, 14, 20, 28, 36, 42 of 2014 Guidelines

⁷⁸ May 2014 at page 7

35. The three categories give sentencers discretion when assessing culpability.

Harm

36. Harm is assessed in four⁷⁹ of the guidelines – not Possessing, making or supplying articles for use in fraud nor Bribery – on the basis of financial loss caused or intended to be caused. With an additional harm assessment for Fraud allowing the court to increase the starting point sentence as a result of the harm caused to the victim.⁸⁰ Within the money laundering guideline the level of harm associated with the underlying offence is to be considered as part of the harm assessment which may increase the starting point.

37. In relation to the Fraud guideline harm is initially assessed on the basis of “the actual, intended or risk loss that results from the offence”⁸¹. There are five categories of harm (Harm A) with values ranging from less than £5,000 to £500,000 or more.

38. Once the appropriate category is established the court is directed to take account the level of harm (high, medium or lesser impact) (Harm B) caused to the victim(s) and to adjust the harm category proportionally.

39. Research showed that sentencers welcomed the two stage approach; with its greater emphasis on the impact the crime has had on the victim than previous guidelines.

⁷⁹ See pages 7, 20, 28 and 36 of 2014 Guidelines

⁸⁰ See page 7 of 2014 Guidelines

⁸¹ Page 7 of 2014 Guidelines

40. In relation to the Possessing, making or supplying articles for fraud guideline harm is assessed as either greater or lesser⁸², based on harm that the articles could cause should they be successfully deployed as a substantive offence. The factors that indicate greater harm are :

- a large number of articles created/supplied/possessed
- articles with potential to facilitate fraud affecting a large number of victims
 - involving significant sums
 - use of third party identities
 - considerable gain to offender.

Lesser harm covers all other offences.

41. In relation to Revenue fraud seven categories of harm based on monetary figures ranging from less than £20,000 up to £50 million or more have been set out in the guideline⁸³; with the assessment of harm being the amount/relief obtained or intended loss to Her Majesty's Revenue and Customs.

42. In relation to Benefit fraud six categories of harm ranging from less than £2,500 up to £2 million obtained or intended to be obtained are set out in the guideline.⁸⁴

43. In relation to Money Laundering a two stage harm assessment is set out.⁸⁵ Harm A contains six categories of harm ranging from less than £10,000 up to £10 million. To complete the assessment (Harm B) the court is directed to take account of the harm associated with the underlying offence where it is known and then, if it is the case involving greater harm, whether it warrants the sentence being moved up to the corresponding point in the next higher category or to the top of the range in the initial category.

⁸² See page 14 of 2014 Guidelines

⁸³ See page 20 of 2014 Guideline

⁸⁴ See page 28 of 2014 Guideline

⁸⁵ See page 36 of 2014 Guideline

44. In relation to Bribery no financial figures have been used in the harm assessment. The four category of factors to be used to assess harm consider the impact caused by the offending (whether to identifiable victims or the wider context) and the actual or intended gain to the offender.⁸⁶

Aggravating factors

45. Aggravating factors specific to the frauds are set out in the six guidelines:

Fraud⁸⁷ :

- previous convictions
- steps taken to prevent the victim reporting or proceeding
- attempts to conceal evidence
- community impact
- failure to comply with court orders
- TIC's
- failure to respond to warnings
- committed across borders
- blame wrongly placed on others

Possessing, making or supplying articles for use in Frauds⁸⁸ and Money Laundering⁸⁹ :

- same as fraud noted above

Revenue fraud⁹⁰ :

- all of the above fraud factors +
- multiple frauds
- number of false declarations
- damage to third party
- health risk
- goods to under age purchasers

⁸⁶ See page 42 of 2014 Guideline

⁸⁷ See page 10 of 2014 Guidelines

⁸⁸ See page 16 of 2014 Guidelines

⁸⁹ See page 38 of 2014 Guidelines

⁹⁰ See page 24 of 2014 Guidelines

Benefit fraud⁹¹:

- all of fraud factors +
- multiple frauds
- length of time
- number of false declarations

Bribery⁹² :

- all of fraud factors +
- pressure exerted on another party
- offence committed to facilitate other criminal activity

Mitigating factors

46. Mitigating factors specific to the frauds are set out in the six guidelines:

Fraud, possessing, making or supplying articles for use, Revenue fraud, Money Laundering and Bribery (where relevant) have identical mitigating factors⁹³:

- No previous (or relevant) convictions
- Remorse
- Good/exemplary character
- Little prospect of success
- Serious medical condition
- Age/lack of maturity
- Lapse of time
- Mental disorder
- Sole/primary carer
- Co-operated with the investigation
- Early admissions
- Voluntarily reported
- Addressed addiction
- Activity originally legitimate

⁹¹ See page 32 of 2014 Guidelines

⁹² See page 44 of 2014 Guidelines

⁹³ See pages 10, 16, 20, 36 and 44 of 2014 Guidelines

Benefit fraud the additional factors are listed in the guideline⁹⁴:

- Legitimate entitlement to other benefits
- Claim originally legitimate but ceases to be so
- Content of original application accurate
- Offender experiencing significant financial hardship or pressure at time the fraud was committed was due to exceptional circumstances

D. Corporate offenders

47. Corporate offender guidelines⁹⁵ are provided in relation to Fraud, Bribery and Money Laundering offences.

48. Most cases of corporate offending in this area are likely to merit allocation for disposal in the Crown Court. Committal for sentence from the Magistrates' Court to the Crown Court is mandatory⁹⁶ if confiscation (step two) is to be considered.

49. Compensation is to be considered as the first step in sentencing. The court must consider making a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence in such amount as the court considers appropriate, having regard to the evidence and to the means of the offender. Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty.

50. Step two involves consideration of confiscation if either the Prosecution or the Court thinks that it may be appropriate. Confiscation must be dealt with before, and taken into account

⁹⁴ See page 32 of 2014 Guidelines

⁹⁵ See pages 47 to 55 2014 Guidelines.

⁹⁶ As per section 70 Proceeds of Crime Act 2002

when assessing, any other fine or financial order (except compensation⁹⁷).

51. Step three involves determining the offence category in terms of three levels of culpability (high, medium and lesser) determined by the following factors:⁹⁸

High culpability

- Corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others)
- Wilful obstruction of detection (eg destruction of evidence, misleading investigators, suborning employees)
- Involving others through pressure or coercion (eg employees or suppliers)
- Targeting of vulnerable victims or a large number of victims
- Corruption of local or national government officials or ministers or law enforcers
- Abuse of dominant market position or position of trust or responsibility
- Offending committed over a sustained period of time
- Culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place (section 7 Bribery Act only)

Medium culpability

- Corporation plays a significant role in unlawful activity organised by others
- Activity not unlawful from the outset
- Corporation reckless in making false statement (section 72 VAT Act 1994 Fraudulent evasion of VAT)
- All other cases between higher and lesser culpability

Lesser culpability

⁹⁷ See section 13 Proceeds of Crime Act 2002

⁹⁸ See page 49 of 2014 Guidelines

- Corporation plays a minor, peripheral role in unlawful activity organised by others
- Some effort made to put bribery prevention measures in place but insufficient to amount to a defence (section 7 Bribery Act only)
- Involvement through coercion, intimidation or exploitation

52. In step three the offence category is determined with reference to culpability (as noted above) and harm.

53. Harm is represented by a financial sum calculated by reference to the amount obtained or intended to be obtained or loss avoided or intended to be avoided.

54. For offences of Fraud, Conspiracy to Defraud, Cheating the Revenue and Fraudulent evasion of duty or VAT, harm will normally be the actual loss or intended gross gain to the offender.

55. For offences under the Bribery Act the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure for offences under section 7 may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery.

56. For offences of Money Laundering the appropriate figure will normally be the amount laundered or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher.

57. Where the actual or intended gain cannot be established, the appropriate measure will be the amount that the court considers was likely to be achieved in all the circumstances. In the absence of sufficient evidence of the amount that was likely to be obtained, 10-20 per cent of the relevant revenue (for instance between 10 and 20 per cent of the worldwide revenue derived from the product or business area to which the offence relates for the period of the offending) may be an appropriate measure. There may large cases

of fraud or bribery in which the true harm is to commerce or markets generally. That may justify adopting a harm figure beyond the normal measures.

58. Step four⁹⁹ involves determining the starting point within the category range.

59. Having determined the appropriate starting point, the court should then consider adjustment within the category range for aggravating and mitigating features. In some cases this may involve moving outside the identified category range.

60. The factors increasing seriousness, include, but are not restricted to:

- Previous relevant convictions or civil or regulatory enforcement action
- Corporation or subsidiary set up to commit fraudulent activity
- Fraudulent activity endemic within corporation
- Attempts made to conceal misconduct
- Substantial harm (whether financial or otherwise) suffered by victims of offending or by third parties affected by offending
- Risk of harm greater than actual or intended harm (eg in banking/credit fraud)
- Substantial harm caused to integrity or confidence of markets and local/national governments
- Serious nature of underlying criminal activity (money laundering offences)
- Offence committed across borders or jurisdictions

⁹⁹ See page 50 of 2014 Guidelines.

61. The factors reducing seriousness or reflecting mitigation, include, but are not restricted to:

- No previous relevant convictions or civil or regulatory enforcement action
- Victims voluntarily reimbursed/compensated
- No actual loss to victims
- Corporation co-operated with investigation, made early admissions and/or voluntary reported offending
- Offending committed under previous director(s)/manager(s)
- Little or no actual gain to corporation from offending

62. In determining the appropriate level of fine¹⁰⁰ the fine must reflect the seriousness of the offence and take account the financial circumstances of the offender.

63. In terms of obtaining financial information where the offender is a company or a body which delivers a public or charitable service, it is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.¹⁰¹

64. For companies and partnerships annual accounts will be considered, with particular attention paid to turnover, profit before tax, directors' remuneration, partners' drawings, loan accounts, pension provision, assets disclosed on the balance sheet. Failure to produce relevant accounts on request may properly lead to the

¹⁰⁰ See section 164 of the Criminal Justice Act 2003

¹⁰¹ See page 51 of 2014 Guidelines.

conclusion that the company/partnership can pay any appropriate fine.

65. For local authorities, fire authorities and similar public bodies the Annual Revenue Budget is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.
66. For health trusts the independent regulator of NHS Foundation Trusts is Monitor publishing quarterly and annual figures for the financial strength and stability of trusts from which the annual income can be seen.¹⁰²Detailed analysis of expenditure or reserves is unlikely to be called for.
67. For charities it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.
68. Step five involves adjustment of the fine. Having arrived at a fine level, the court should consider the overall effect of compensation, confiscation and fine to see if it has achieved :
 - the removal of all gain
 - appropriate additional punishment, and
 - deterrence.

The fine may be adjusted to ensure these objectives are met in a fair way.

¹⁰² Available via www.monitor-nhsft.gov.uk.

69. The court should consider any further factors relevant to the setting the level of the fine to ensure that the fine is proportionate, having regard to the size and financial position of the offending organisation and the seriousness of the offence.

70. The fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law. Whether the fine puts the offender out of business is relevant; in some bad cases this may be an acceptable consequence.

71. The court can allow time to pay a financial penalty by instalments.

72. Compensation takes precedence over other financial penalties.

73. In adjusting the level of fine upwards or downwards the Guidelines¹⁰³ set out a non-exhaustive list of factors for courts to consider:

- Fulfilment objectives of punishment, deterrence and removal of gain
- Value, worth or available means of the offender
- Fine impairs offender's ability to make restitution to victims
- Impact of fine on offender's ability to implement effective compliance programmes
- Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
- Impact of fine on performance of public or charitable function

¹⁰³ At page 52 of 2014 Guidelines

74. Steps 6-10 deal with assistance to prosecution, reduction for guilty pleas, ancillary orders, totality principle and reasons to be given.

E. Concluding remarks

Banks on Sentence¹⁰⁴ makes the point that

“ Fraud is not a victimless crime. The monetary cost is significant, but fraud offences also cause considerable social and economic harm beyond their immediate financial impact. Fraud can be used to fund organised crime that may target vulnerable victims (drug and people trafficking, for example) and fraud offences that target individuals can ruin lives, close businesses or take life savings” .

The 2014 guidelines place greater sentencing emphasis on the affect that fraud offences have upon victims.

¹⁰⁴ 8th edition (2013) volume 2 page 2-433, citing from paragraph 13, page 5 Sentencing Guidelines Council “Sentencing for Fraud – Statutory offences” guideline (October 2009).