

THE ROLE AND RESPONSIBILITIES OF THE SERIOUS FRAUD OFFICE IN FIGHTING FRAUD WITHIN THE UNITED KINGDOM

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The Serious Fraud Office and the office of Director were created by the enactment of the Criminal Justice Act 1987. The Serious Fraud Office is a non-Ministerial Government Department whose activities are subject to the superintendence of the Attorney General. This means that we are not subject to political interference in the conduct of our duties. The role of the Attorney General is somewhat difficult to define. He is responsible to Parliament for the work of the Serious Fraud Office and he is able to require the Director to explain and justify his decisions and, quite correctly, frequently does so. However, he may not affect those decisions directly or indirectly. Indeed, even in cases of great political sensitivity, no Attorney General has ever sought to do so. The independence of the Director is a central feature of his role.

As a Government Department created by statute, the remit of the Serious Fraud Office is very strictly constrained and is limited to those matters provided for in our founding statute.

By Section 1(3) of the Criminal Justice Act 1987,
“the Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud”.

Perhaps surprisingly there is no definition of what constitutes ‘serious or complex fraud,’ this has meant that the Serious Fraud Office has had to develop its own view of this phrase and what it means. I shall return to this issue later.

The Act goes on in Section 1(5) to provide that

“the Director may –

- (a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and*
- (b) take over the conduct of any such proceedings at any stage”.*

Thus the Director is empowered to investigate and prosecute. Perhaps not a startling statement but in terms of the United Kingdom, and specifically England, Wales and Northern Ireland, this was a dramatic departure from previous practice.

Indeed, the Serious Fraud Office is a wholly unique organisation in terms of Law Enforcement Agencies within England, Wales and Northern Ireland. I specifically exclude Scotland from these discussions because the Scottish legal system is radically different from that in the remainder of the United Kingdom.

It may be helpful to explain the context in which the Serious Fraud Office was created, the general situation as far as Law Enforcement in the UK is concerned and the development of the Serious Fraud Office through its life.

On the 8th November 1983, the then Lord Chancellor and Home Secretary announced the establishment of an independent Committee of Enquiry whose terms of reference were:

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

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The report of the Fraud Trials Committee makes reference to the widespread public concern at the effectiveness of the methods of combating serious commercial fraud that led to the establishment of the Committee.

Concerns over the delays involved in conducting investigations were also highlighted in the report. It may help if I outline the prevailing system of the time, which should explain why this concern existed. Often, following the collapse of a major company, the Department of Trade and Industry would appoint Inspectors under the Companies Act. These Inspectors were usually a highly respected Barrister of many years experience and an expert Accountant from one of the major Accountancy practices. They would be appointed to enquire into the circumstances of the collapse of the company and to publish a report of their findings.

If, in conducting their enquiries, the Inspectors decided that fraud was suspected, then the report would not be published immediately and the matter would be referred to the Police for investigation. Often this referral to the Police would commence some two years after the events in question due to the painstaking nature of the Inspectors' enquiries.

The Police would then commence a criminal enquiry which would often cover much of the same ground that the Inspectors had previously been over and would often take two to three years of itself. Once the Police had completed their enquiries, the matter would be referred to Prosecutors who would consider the evidence that the Police had brought forward and would decide whether any charges were appropriate. Commonly the evidence and the charges that the Police had put forward were changed and additional enquiries were required before a prosecution was allowed to take place. Thus it could often be the case that a criminal prosecution would not commence until six or seven years after the events in question had occurred. This often meant that trials were extremely difficult because the evidence wasn't entirely consistent and witnesses' memories of events had faded. Often these cases resulted in acquittals, either by the jury or on the instruction of the judge, which would occur because the evidence failed to reach the required standard.

Just to explain this, in English cases, there are two standards that must be reached during a trial. The first is that the judge must be satisfied that there is sufficient evidence upon which a jury properly directed could safely convict, if this point is reached at the close of the prosecution case then the case proceeds, we say it 'passes half time', and the defence then calls any evidence they wish. After all the evidence has been heard the second standard is that the jury must be satisfied so that they are sure that the defendant has committed the crime he is being tried for.

So, in the event of convictions, because of the passage of time from the events in question to the case being concluded, often wholly inadequate sentences were handed down against the fraudsters.

It was only after the criminal investigation or trial that the Inspectors' report would be published. These often made specific findings of fraudulent conduct on the part of those involved, many of whom were never satisfactorily prosecuted. Not surprisingly, this system led to widespread unhappiness with the ability of investigators and prosecutors to deal with such cases.

It was in the light of these problems and concerns that the Fraud Trials Committee were asked to make recommendations. The Committee, headed by a very senior judge, a Law Lord, Lord Roskill, reported on the 9th December 1985, over two years after its inception and after the most extensive of enquiries.

The opening sentences of the Summary at the commencement of the report were highly damning of the existing regime and are worth quoting:

"The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right."

The report goes on to make a number of recommendations which advocated fundamental change to the existing system and which caused a great deal of furore at the time.

Interestingly, some of the most radical changes proposed by the Committee were accepted by the Government and the legal professions with very little difficulty. Others met with very considerable opposition.

The very first recommendation of the First Trials Committee was that there should be a new unified organisation, which later became the Serious Fraud Office, which should be responsible for "*all the functions of detection, investigation and prosecuting of serious fraud...*"

In the event, the Serious Fraud Office was not given powers to detect serious fraud, merely to investigate and prosecute. Whether that was a wise course is impossible to say but it has been a recurring theme during the life of the Serious Fraud Office that it is an organisation which is purely reactive to events and is not able to properly take part in proactive activity which might prevent fraudulent conduct. Unlike the fight against organised crime which is predominantly intelligence led, seeking to disrupt or prevent organised crime groups from functioning, the fight against serious and complex fraud is an *ex post facto*, an after the fact, review of events.

There are several reasons for this, not least of which is that fraudulent activity tends to be less susceptible to being anticipated. Many major frauds are not premeditated in the same way as is much organised crime activity. This is not to diminish the consequences and the harm that can flow from major fraud. In the United Kingdom, it has been an almost inevitable feature of major fraud that personal tragedies occur.

The second major proposal of the Fraud Trials Committee was that the new organisation should have "Case Controllers"; these were to be lawyers who would have responsibility for directing the investigation process from the outset, and who would also be responsible for the subsequent prosecution up to the verdict being handed down. This was a radical departure to previous practice and not universally approved of, even today. Let me explain why.

In 1985 when the Fraud Trials Committee reported, the Prosecution of Offences Act 1985 had only just set up the Crown Prosecution Service, which was a new national organisation whose responsibility it was to prosecute all criminal cases coming from the Police Service but who were to play no part at all in the investigation process and were required to be completely independent of the investigating agencies. The creation of the CPS followed on from a previous Royal Commission which looked into concerns that the 'old' County Prosecuting Solicitors Offices, which were linked directly to each of the local Police Forces, were insufficiently 'independent' of the police in carrying out their functions. This principle, of prosecutorial independence from the investigators, has become known as the Phillips principle after the judge who first proposed it and it remains a bedrock principle underpinning English criminal practice today. Except that is, where the Serious Fraud Office operates. Indeed several very senior judges have undertaken reviews of various events or organisations since the Serious Fraud Office was created; they have all fully endorsed the Phillips principle. At the same time they have all supported the 'SFO Model' for fraud as being the only sensible approach to the issue. As might be appreciated a certain tension exists between the various agencies as a result.

I would now like to turn to the most controversial recommendation of the Roskill Committee and the one which caused the most argument. It was that juries, regarded as a fundamental principle of English law since the Magna Carta, should be abolished for serious fraud cases and should be replaced by a panel of specialists, who would more easily be able to understand the complexities of the transactions that are involved in serious fraud cases. This recommendation was strongly opposed by many in the judiciary and the legal profession of the time and, as a direct result, was not implemented by the Government.

Interestingly, the current Government has recognised the weaknesses of jury trial in serious and complex fraud cases and in the Criminal Justice Act 2003 it has enacted provisions which would do away with juries in some serious fraud cases in England and Wales to be replaced by trial by Judge alone. Those provisions were equally fiercely opposed during the passage of the Bill and it has been agreed that they will not be brought into force until both Houses of Parliament pass a motion agreeing to this. Such is the attachment to the principle of trial by jury that it is considered very unlikely that these provisions will ever be brought into force.

The issue of juries and their ability to understand serious fraud cases has been a running theme throughout the life of the Serious Fraud Office. It is an issue which will not go away but which seems incapable of being resolved. Part of the reason for this is the absolute secrecy of jury deliberations, which prevents any assessment of the effectiveness of the jury process.

Following the creation of the Serious Fraud Office in 1988, there was widespread concern in the professions about the powers that had been allocated to the Serious Fraud Office to enable them to expeditiously undertake their enquiries.

These powers, afforded to the Director by Section 2 of the 1987 Act, are again a departure from the norm in relation to Law Enforcement powers generally in England and Wales.

In fact, while they have often been described as draconian, they are in fact less severe than powers allocated to Companies Act Inspectors under the Companies Acts, although the purpose is virtually identical. That purpose is to allow those undertaking the enquiry to quickly gather information to enable them to ascertain what occurred. It should be noted that the operative word is 'information' as opposed to 'evidence'. The distinction is significant even though many fail to appreciate that a distinction even exists. But that is a discussion for another day.

Nevertheless these powers have been the subject of frequent challenge and have been gradually modified by case law, both domestic and under the European Convention of Human Rights.

So what are these powers? The powers afforded to the Director permit him to require anyone who might reasonably be expected to have information to provide documentation or information for the purposes of his investigation. Thus, individuals, businesses and institutions can be compelled to provide information either in the form of documents or to answer questions and there are sanctions for failing to answer those questions or provide the information or for providing false information in answer to questions. However, mindful of the "right against self incrimination", answers given to such enquiries are not admissible against the maker in any subsequent proceedings, except for the purposes of establishing that he had lied in answer to questioning.

The Act provided that answers given in interview by an accused could be used to establish whether the accused had said something inconsistent with their statement in interview, if he/she later gave evidence on their own behalf which was inconsistent with it. This power, though still a part of the Act, has been superseded by subsequent decisions of the European Court of Human Rights and undertakings given by the Attorney General in response thereto.

I hope that this sets the scene and provides some useful background information to the Serious Fraud Office, how it came into existence and the issues surrounding its creation. I would now like to turn to our role in the fight against fraud.

Given that the Serious Fraud Office's statutory remit is the investigation and prosecution of serious or complex fraud cases, we have had to establish our own aims and objectives to fulfil that requirement. Thus, whilst our function is to investigate and prosecute serious or complex fraud, our aim is to achieve a broader result, which is twofold:

'to deter fraud and to maintain confidence in the United Kingdom's financial systems (by the appropriate and effective investigation and prosecution of serious and complex fraud in England, Wales and Northern Ireland).'

The decision to have the maintenance of confidence in the financial systems of the UK as our aim comes directly from the Fraud Trials Committee report which makes reference to the concern that fraud was not being effectively investigated and prosecuted,

'with potentially harmful consequences not only for the unfortunate victims of fraud, but also for the reputation of the nation, and in particular the City of London, as one of the world's great financial centres'

As will be appreciated, this aim has had an impact on the cases that are selected for investigation. It has also had an influence on the criteria that we apply in selecting cases. I mentioned previously that the absence of a definition of the phrase 'serious or complex fraud' within the Act meant that we were obliged to interpret it ourselves. We did this by framing the criteria for accepting cases to incorporate those factors that we considered would be relevant to an investigation of serious or complex fraud cases. They are listed below:

'The key criterion should be that the suspected fraud was such that the direction of the investigation should be in the hands of those who will be responsible for the prosecution.'

'The factors which would need to be taken into account include:

- 1. Cases of the order of at least £1 million. (This is simply an objective and recognisable signpost of seriousness and likely public concern, rather than the main indicator of suitability ;)*
- 2. Cases likely to give rise to national publicity and widespread public concern. These include those involving Government departments, public bodies, the Governments of other countries and commercial cases of public interest;*
- 3. Cases requiring highly specialised knowledge of, for example, Stock Exchange practices or regulated markets;*
- 4. Cases in which there is a significant international dimension;*
- 5. Cases where legal, accountancy, and investigative skills need to be brought together;*
- 6. Cases which appear to be complex, and in which the use of Section 2 powers might be appropriate.*

None of these factors, taken individually, should necessarily be regarded as conclusive.'

As will be appreciated, these criteria are fairly broadly drawn and allow for a considerable amount of latitude and discretion on the part of the Director in deciding whether to accept a case for investigation or not.

For example, the case may be regarded as being of high public concern where the losses to the individuals are small in real terms, but where the category of victims is such that the impact of that loss on the victim is significant. Thus, where there has been fraud perpetrated against vulnerable groups in society, for example the elderly, for whom even a small loss can have a very considerable impact on their health and wellbeing, cases have been accepted for investigation by the Serious Fraud Office.

Historically, the Serious Fraud Office has sought to interpret its criteria in as positive and inclusive a way as possible, especially as the environment in which we are working has changed over the years.

The history of the Serious Fraud Office is one that commentators have described as chequered. I would not accept that criticism as it proceeds from a fundamental misunderstanding of the context in which we work. For example, the Press will often report that the Serious Fraud Office does not have a very good record in prosecuting very high public interest cases such as Maxwell, Guinness and Blue Arrow. This is slightly unfair as the Serious Fraud Office secured convictions in both the Guinness and the Blue Arrow cases, albeit that we suffered reverses on appeal, in the European Court of Human Rights in the Guinness case and in the Court of Appeal in England in the Blue Arrow case. The Press ignore our successes, such as in the BCCI cases which resulted in convictions in every case.

The record of the Serious Fraud Office generally is good, with a long run conviction rate across the entire history of the Office of 70% (with the 5 year rolling average currently running at a slightly higher rate).

It is fair to say that the Serious Fraud Office occupies a very important position in the fight against fraud in the United Kingdom. In the 16 years of our existence, the Serious Fraud Office has developed an enviable reputation within the professions and the Judiciary, both for the quality of our investigations and prosecutions and also in respect of the innovative way in which we undertake our duties.

Indeed the Serious Fraud Office has always been keen to push the boundaries of investigation and prosecution techniques and has a number of 'firsts' in the use of technology in the presentation and delivery of cases.

In addition the Serious Fraud Office has always maintained a very self-critical attitude toward the conduct of investigations and prosecutions and has undergone a number of self-imposed reorganisations to ensure that we continue to improve our performance across every Division of the office.

The Serious Fraud Office is currently organised into four Operational Divisions, headed by Assistant Directors who are very experienced prosecutors and staffed by Case Controllers, Investigating Lawyers, Investigators and support staff. We find this multi-disciplinary approach is the most effective way of working.

Individual case teams will incorporate a range of disciplines dependant upon the requirements of the case. Each case is headed by a Case Controller, as envisaged by the Roskill Committee, who is responsible for the case from acceptance right through to the verdict and any appeal. We strive wherever possible to avoid changing the Case Controller as this continuity is a very important factor in making our cases a success.

As regards the investigators we employ, we are committed to having as diverse a group of specialists as possible; to this end we employ stockbrokers, insolvency specialists, insurance specialists and a variety of accountants and investigators from a wide range of backgrounds, including many former police officers.

As regards our caseload, all Operational Divisions share responsibility for cases arising in the London area but each of them has specific responsibility for a different part of England, Wales and Northern Ireland. This allows us to develop very close relations with those police forces we work with. In achieving this it has brought benefits to both the Serious Fraud Office and the police forces concerned in terms of improved familiarity with our ways of working and a greater understanding of the issues affecting each of us and a willingness to work together to overcome problems.

This has been especially important in the last few years when police forces have been under increasing pressure to reduce the resources available for investigating fraud due to other policing commitments, such as street robberies, domestic burglaries and car crime. Having developed these close relations, we have been able to anticipate problems and minimise the impact of reducing resources from the Police, albeit this is now becoming quite a serious issue.

I am pleased to say that this has been recognised by the Government and a new initiative has been brought forward whereby the City of London Police will act as a 'lead Force' for cases arising in London and the South-East. This will mean that in the 14 police force areas that comprise 'London and the South-East' the City of London Police will provide additional police resources over and above that provided by the 'home' force to enable us to undertake these investigations more effectively. In addition, the Serious Fraud Office has been granted additional resources by the Government to increase our staff numbers to approximately 300 permanent staff to further help in this regard.

It will be appreciated that the Serious Fraud Office, with a limited budget and a relatively small staff of approximately 240 permanent members, can only ever undertake the very top echelon of fraud cases that arise in England, Wales and Northern Ireland. Indeed, at any one time, the Serious Fraud Office will only have approximately 80-90 cases under investigation and prosecution.

Our approach to investigating cases is simple. We assess what we consider to be the essential criminality of those involved and focus our enquiries on only those areas that are likely to result in securing the evidence required to prove the case. We commonly exclude potential lines of enquiry that would divert us from our primary focus, either from the outset or those that are discovered as we proceed with the investigation. Nevertheless we always seek to keep an open mind on the investigation and will change our approach where this is appropriate.

We maintain tight control over the course of the investigation by preparing outline investigation plans and as the investigation proceeds making these increasingly more detailed to ensure the work being done follows the plan. We use other standard tools for following the progress of letters of request and notices issued using our investigation powers to ensure that delays in gathering evidence are kept to a minimum.

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The Investigation Plan and the progress of the investigation generally is discussed on a monthly basis at a Case Conference, which brings the whole team together, both the Serious Fraud Office and Police staff, to deal with developments and make any necessary decisions relating to issues that may have arisen. We find these conferences have two benefits; it improves team work by ensuring that everyone understands the role they have within the team and how their work is contributing to the overall goal and it also gives the team the opportunity to raise issues of concern and discuss them as a group.

The issue of international co-operation is one that arises in the vast majority of our cases. Given that these enquiries are often the cause of delay in conducting our investigations, we pursue only those overseas enquiries that are essential to our case and we seek to initiate those enquiries at the earliest opportunity.

For many years now we have seen the immense value of close international co-operation and seek to develop ever-closer links with our colleagues overseas to bring this about. We regularly play host to international colleagues and, subject to budgetary constraints, are enthusiastic advocates of the International Association of Prosecutors, which promotes and fosters such better relations.

Despite the fact that we are a small department and only deal with the most serious of cases, the Serious Fraud Office is looked to, to provide a lead and to set the standard. This is a challenge we accept and strive to meet.

The focal role the Serious Fraud Office has in leading the fight against fraud has both disadvantages and compensations. In consequence of the fact that we are a small department, resources are necessarily stretched to cover all the areas where we are asked to contribute to government policy, at the same time the fact that we are involved so often means we have the opportunity to influence decisions out of all proportion to our relative size.

In consequence of our central position in the fight against fraud, throughout the life of the Serious Fraud Office, senior members of the office have undertaken public speaking engagements. There have been two reasons for this, to explain how we work and our commitment to ensuring that fraud is being effectively tackled and also to raise awareness of fraud and fraud issues in the minds of the public, the establishment and the financial services industry. In this way we are able to make a small contribution to promoting fraud prevention and awareness issues and techniques.

In addition, the Serious Fraud Office is determined to play a full part on the international stage. We have developed our own Mutual Legal Assistance Unit, which handles incoming requests from countries throughout the world in relation to inquiries to be made in the United Kingdom. If the Director accedes to the request then we are able to use our powers to gather information, which can be produced in evidence if required. This unit has only been operating for a short while, but has already undertaken many dozens of requests on behalf of many Foreign Governments and provided very valuable assistance in the fight against fraud worldwide. The Serious Fraud Office is committed to providing this service to our colleagues across the world as it is one of our central beliefs that greater co-operation between international colleagues is the only way in which international fraud can be effectively handled. Further we contribute to improving knowledge of fraud investigation and prosecution techniques by taking part in training courses such as these and in the process improve our own knowledge.

At the same time the Serious Fraud Office is very keen to develop our own working tools and practices to ensure that we keep at the very cutting edge of investigation and prosecution techniques. That is not to say that we consider ourselves to be leaders in this highly specialist field because there are always things that we can learn from our colleagues both at home and around the world. Our approach is simple, we are always prepared to learn new techniques and to take advantage of others experience to improve ourselves so that we can undertake our duties and fulfil our responsibilities to the very best of our ability.

The Serious Fraud Office has embraced the use of technology in the way we investigate and prosecute. In the United Kingdom, the Serious Fraud Office was the first prosecutor to use satellite links to bring evidence from a witness outside the jurisdiction before a UK Court. We have pioneered the use of presentational systems (images of documents rather than the documents themselves) and tools (such as PowerPoint and other graphics packages) as a means of streamlining the proceedings in court and conveying

highly complex information in a readily digestible form, and we have been quick to pick up on the excellent work of our colleagues around the world who routinely use these techniques in presenting their cases to improve our own.

Perhaps our most significant development is our most recent one. We have devised an entirely new computer system which, together with refined and improved working practices, will allow us to proceed from the commencement of our investigation through to the verdict of the trial (or perhaps the close of any appeal) using one set of IT tools. There is nothing intrinsically new in what we have done, which is to use images of documents rather than the documents themselves, but we have, we believe, developed the first end-to-end system which complies with the legal requirements that apply to the investigation of cases in England and Wales, but also allows the investigator the maximum flexibility in how they can use the tools to facilitate the investigation. We hope to reduce the length of our investigations by at least 25% using this system.

Another major responsibility of the Serious Fraud Office is to develop and maintain good working relations with regulators. We see it as a major part of our duties to co-ordinate with regulators to ensure complimentary working practices to better undertake our respective duties. To achieve this we meet regularly with the many regulators that operate in the UK to discuss areas of interest or concern and to seek ways of improving our relationship. In addition we participate in information sharing arrangements with them to try and make sure that we are each able to work from the best available information.

Whilst we would not boast of our achievements, our record is one I believe we can be proud of, not that we measure ourselves by reference to this. Rather we have worked hard to acquire a reputation for prosecuting with integrity, fairness and to a high standard. Nevertheless our conviction rates are good, convicting 70% of all defendants since our inception, and averaging 76% over the last five years. In respect of prosecutions, which usually involve multiple defendants, we have secured convictions against at least one defendant (usually the main suspect) in 83% of cases. But we are not content. Statistics are a poor judge of quality. It is our aim to continue to improve, both in terms of the quality of our casework and the speed with which we bring cases before the courts.

The Roskill Committee, at the start of their report, quote from Magna Carta. The quote is as valid today as it was nearly 800 years ago. I finish by quoting it to you;

'Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam'

'To no one will we sell, to no one will we deny or delay, right or justice'

Magna Carta Chapter 40.