THE SOCIETY FOR ADVANCED LEGAL STUDIES

FINANCIAL REGULATION WORKING GROUP

CHAIRMAN: GEORGE STAPLE QC

REPORT ON PARALLEL PROCEEDINGS

DECEMBER 1999

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1. Terms of Reference

1.1 The Executive Committee of the Society for Advanced Legal Studies established the Working Group on Financial Regulation under the Chairmanship of George Staple QC in April 1998. The full membership of this Working Group is set out in the Appendix.

1.2 The Working Group was given the following terms of reference:

> "To consider the legal, practical and evidential problems that arise when proceedings are initiated at different levels within the legal and regulatory structure of a single jurisdiction and in different jurisdictions in regard to the same or related matters."

In June 1998 the Lord Chancellor delivered the KPMG Lecture entitled "The Feasibility of a Unified Approach to Proceedings Arising out of Major City Fraud". He said frankly at the outset:

> "The problem is complex. The Government knows no obvious, nor easy, solutions. This speech announces no decisions, and promotes no new policies by Government, nor personal initiatives. It asks questions and seeks views. In particular I offer my reflections on whether further unification of some proceedings, in one "super-set", is feasible. What might that contribute to our ability to tackle major frauds? Unified proceedings would be consistent with the steps already being taken towards a more coherent and expeditious system".

The speech proved to be of considerable benefit in spurring debate, in raising a number of new ideas and in providing a focus for the task of the Working Group. The Lord Chancellor's imaginary, but vividly described banking case, with all the overlapping investigations and proceedings that typically arise, when a major City fraud occurs, greatly helped the Working Group to develop its thinking on the relevant issues, and to consider how the delays and duplication in such a case might be reduced.

This report, therefore, considers the problems that arise from parallel proceedings within the national jurisdiction and ways in which those problems could be addressed.

2. The Issues

2.1 The range of proceedings that may be brought, particularly in instances of serious fraud, includes

- criminal proceedings, brought by the Serious Fraud Office, CPS or other prosecuting authorities eg. HM Customs and Excise

- civil proceedings, brought by the Financial Services Authority (FSA) against those subject to its powers, by liquidators against those who may have defrauded the company, by the DTI for disqualification of company directors, and by private litigants seeking to redress private law wrongs

- regulatory proceedings, brought by regulators, within the FSA regulatory system or by professional bodies eg. Office for the Supervision of Solicitors; Accountants' Joint Disciplinary Scheme

- proceedings before an ombudsman brought by private parties eg. pensions, financial services ombudsmen.

The whole matter may also be the subject of an investigation by the DTI under the Companies Act or under the Financial Services Act 1986 for insider dealing, which may or may not lead to publication of a report or to criminal proceedings being brought.

Finally, it is proposed in the Financial Services and Markets Bill to give the FSA powers of criminal prosecution in relation to insider trading, market manipulation and money laundering.

2.2 Each of these proceedings serves a different set of purposes. In very broad terms, criminal proceedings are concerned with the attribution of blame to a particular individual. Civil proceedings are concerned with the redress of private law wrongs, principally, but not exclusively, remedying loss suffered. Regulatory proceedings are directed to upholding the statutory or self-regulatory scheme in the public interest. Proceedings before ombudsmen are intended to provide a quicker and cheaper means of remedying loss than civil proceedings. DTI investigations are for the purpose of finding out how the fraud occurred, to assess the impact of the fraud in the wider context and to consider the merits of criminal proceedings and possible law reform.

2.3 The functional differentiation of proceedings has its advantages. Principally it allows the many different facets of what is often a complex situation to be addressed by processes specially designed for a range of purposes. However, it does pose significant practical difficulties for both the regulatory and prosecuting authorities and for private plaintiffs and defendants. The principal issues of concern include:

- duplication of resources in investigations by the police and other investigating authorities, such as the SFO and HM Customs and Excise, regulators and DTI and other inspectors,

- the risk of inconsistent decisions in different proceedings on the same facts and with respect to the same or similar causes of action,

- the difficulties faced by defendants having to defend in a number of fora, which range from problems of logistics (two places at once) to the resource constraints on the defendant's ability to prepare properly for all sets of proceedings,

- the risk of double jeopardy,

- the risk of "spill over" effects; the potential for the proceedings and decisions in one for prejudicing the proceedings and decision making in another,

- multiple use of evidence that was gained initially for a single purpose,

- the potentially conflicting roles of an individual in various proceedings eg a witness in criminal proceedings, who is also the subject of disciplinary proceedings may be inhibited from giving information to the prosecuting authorities,

- the lack of adequate gateways for sharing information may result in authorities having insufficient or inadequate information to be able to proceed effectively.

2.4 Multiplicity of proceedings also inevitably raises the issue of priority: which should come first – investigative, criminal, civil or regulatory? There are a number of competing considerations involved in answering this question. The central issue, however, concerns the extent of the information that may be disclosed in the different proceedings, and subsequently used in other proceedings.

2.5 There could be tactical advantages for the defendant, eg, if the civil proceedings were to be prior to the criminal, as the defendant may be able to obtain more information through the rules of discovery in the civil process than could be available to him, at least initially, in the criminal process. On the other hand, if the civil or regulatory proceedings were to precede the criminal trial, then the defendant may risk premature disclosure of his defence. The position is complicated by the scope of the privilege against self-incrimination, available in criminal cases but not necessarily in

investigations, [1] and which may be excluded by the rules of self-regulatory bodies.[2] Where the privilege is abrogated or excluded the defendant may have to reveal information in one set of proceedings that he would not have to reveal in another. The issue of priority and of the subsequent admissibility of that evidence in different proceedings is thus of critical importance to him.

3. The Current Position

The current position is summarised below, and is drawn, in part, from the work of a sub-group under the Chairmanship of John Powell QC. It may be compared with the positions in a number of overseas jurisdictions. Sub-groups were also formed to consider the law and procedure of the United States (Chairman, William Blair QC), Australia, New Zealand, Singapore and Malaysia (Chairman, Peter Gerrard C.B.E.) and Germany (Chairman Dr Mads Andenas). The working papers of these sub-groups are available separately on request from the Institute of Advanced Legal Studies. The Working Group concluded that, in view of major differences in both regulatory framework and substantive law, with few exceptions, the direct importation of solutions from other jurisdictions was unlikely to be practicable. However the sub-groups' studies served to establish that, while some other countries may be perceived to have less of a problem, or to be more successful in managing it, there are few transferable answers.

3.1 *Investigations*

3.1.1 Investigations may be undertaken in the UK by a range of authorities: the Serious Fraud Office, the Police, HM Customs and Excise, the Inland Revenue and the DTI, and regulators. There are no formal rules stipulating that any one set of investigations has priority over any other, nor are there any requirements on the mandatory sharing of information obtained. Each authority has a wide set of powers to obtain oral and documentary information and legislation allows the transfer of information between the authorities. There are in practice close relations between the relevant public bodies responsible for regulation and enforcement. They are all members of the Financial Fraud Information Network (FFIN), and the Financial Services

[1] Although the information obtained is not admissible in subsequent criminal trials: *Saunders v UK* [1997] 23 European Human Rights Report (EHRR) 313. See also section 59 and schedule 3 of The Youth Justice and Criminal Evidence Act 1999.

[2] *R v Institute of Chartered Accountants of England and Wales, ex parte Nawaz* [1997] PNLR 433; (1996) Times, 7 November.

Authority has announced it will be entering into Memoranda of Understanding with the SFO, CPS and DTI.

Guidelines have been drawn up by the FSA and the SFO for determining where "priority" should be assigned when the criminal and the regulatory functions overlap. Where "priority" is accorded to a body, that body is left clear to proceed with its investigation. The other body may be "on hold" until either the first body decides not to proceed further, or the stage is reached where intervention by the other body may proceed safely without prejudice to action by the first one. In some cases, regulators may proceed with "fringe" players, whilst priority is accorded to the prosecuting authority in respect of the central characters.[3]

3.1.2 The passage of information between the public bodies and potential private litigants, including liquidators, is more restricted. Generally, banks, legal and accountancy professionals and liquidators may be required to provide information to public authorities[4], but information cannot move in the other direction (eg. from public authorities to liquidators), at least not without the consent of the person giving the information.[5] There are no provisions permitting the disclosure of information by public authorities to other potential private litigants.

3.2 ***Range of proceedings***

3.2.1 As noted above, a number of different sets of proceedings can currently be brought. The three principal sets are criminal, civil and regulatory. In addition, the matter may be the subject of a government investigation. These proceedings differ in a number of ways. The material areas of difference for these purposes are the information that may be disclosed in each set, and the standards of proof.

[3] Rosalind Wright, "What is Wrong with the Present System of Trying Persistent and Complex Fraud Cases"? Address to the Symposium on Economic Crime, Jesus College, University of Cambridge, September 1998.

[4] For example s.2 Criminal Justice Act 1987.

[5] Details s.236. Insolvency Act 1986; *Marcel and Others -v- Commissioner of Police of the Metropolis and others* [1991] 1 All ER 845; [1992] All ER 72 at 81.

3.2.2 In criminal proceedings, the prosecution is required to disclose all evidence on which it proposes to rely or which may assist the defence in seeking an acquittal. The position is similar in the US. The defence can claim certain privileges on disclosing information, notably legal professional privilege and the privilege against self incrimination, (discussed further below). The prosecution must prove its case beyond a reasonable doubt.

3.2.3 In civil proceedings, information from each side is available to the other under the discovery rules, again subject to legal privilege. The claimant must prove his case on the balance of probabilities.

3.2.4 In regulatory proceedings, the precise procedures differ between the regulatory and professional bodies.[6] Generally, there are no formal rules of evidence, although the legal professional privilege is respected. The rules may waive the privilege against self-incrimination; if so, this has been held to be valid where the rules of the body are based on a contractual relationship between the body and the member, as the member is seen to have waived his rights by becoming a member.[7] This position may be affected by the Human Rights Act.[8] The regulatory bodies must prove their case on the balance of probabilities, although this is on a sliding scale, and generally the more serious the charge the nearer the standard will come to the criminal standard of beyond a reasonable doubt.

3.2.5 Legal professional privilege applies to judicial proceedings, and in the course of investigations by public investigatory bodies, DTI inspectors and regulatory bodies.

The privilege against self-incrimination operates in criminal trials. There have been a number of statutory encroachments on the privilege in the context of investigations by regulatory and prosecution authorities. However the use of

[6] See the Rules of the Joint Disciplinary Scheme, Law Society, Self Regulatory Organisations (SROs), Financial Services Tribunal.

[7] *In R v Institute of Chartered Accountant of England and Wales, ex parte Nawaz* [1997] PNLR 433; (1996) Times, 7 November CA held that privilege on self incrimination had been waived when the bye laws were accepted by the Member.

[8] If the bodies are held to be "public" authorities under the Act. They will almost certainly be held to be so if the DTI's current proposals for reform of the regulation of the accountancy profession and the creation of a statutory regulator go ahead. See DTI Press Release P/98/923, 30th November 1998, available via http://www.dti.gov.uk.

evidence obtained from a defendant under the compulsory powers of those bodies against that defendant at the subsequent criminal trial is contrary to the European Convention on Human Rights[9] and thus now to the Human Rights Act 1998. Furthermore section 59 and schedule 3 of the Youth Justice and Criminal Evidence Act 1999 restrict the use in criminal proceedings of answers and statements given under compulsion under certain enactments. In criminal trials the courts may use their discretion under ss. 76 and 78 PACE to exclude the use of material that may be unfair to the defence.

3.2.6 Information disclosed in criminal or civil proceedings may be disclosed in other proceedings only if it is relevant.

3.3 *Priority of proceedings*

3.3.1 In the common law jurisdictions criminal proceedings normally take precedence over civil proceedings, and indeed, in contrast, for example, to Germany, the courts do not have the power to stay criminal proceedings pending the outcome of other proceedings. Civil proceedings can be stayed pending the conclusion of criminal proceedings. However there is no general rule that they should be stayed in order not to prejudice the defendant's position in the criminal trial.

3.3.2 As noted above, it could be to the advantage of the defendant that the civil proceedings come before the criminal as the defendant may be able to obtain more information through discovery than he could from the prosecution in a criminal trial. In the US, this situation is addressed by the prosecuting authorities applying for a stay of the civil proceedings (which are usually being brought by the SEC) and the SEC will usually not object. Indeed if the stay is not granted it has on occasion dismissed the case without prejudice to refiling in order to avoid damaging the criminal case.

3.3.3 The relationship between regulatory proceedings and civil proceedings has been an issue of recent concern.[10] Although the courts have the power to stay regulatory proceedings, the general principle appears to be that they will

[9] *Saunders v. UK* [1997] 23 European Human Rights Report (EHRR) 313.

[10] See M.Andenas, "Disciplining Auditors - Problems of Parallel Proceedings and Civil Proceedings" (1998) EBLR 1; M Beloff and C Lewis "Bringing Accountants to Book: Statutory Regulation and Civil Litigation" (1994] Public Law, 164-173.

exercise the power cautiously and only where there is a "real risk of serious prejudice which may lead to injustice".[11] Factors that the court may take into account in deciding whether or not to stay regulatory proceedings include:

- the degree of overlap between them;
- the prejudice that may be caused by disclosure of documents in the regulatory proceedings that would not be available in civil proceedings;
- whether the decision in the regulatory proceedings would prejudice the fair trial of the civil proceedings;[12]
- whether the defendant would be able properly to defend two sets of simultaneous proceedings
- the public interest in the urgent resolution of regulatory proceedings.

Although these factors may be unobjectionable in principle, their application has been the subject of considerable criticism.[13]

3.4 ***Double jeopardy***

3.4.1 There is no rule against double jeopardy as such; however no person can be tried for the same offence twice, and in civil proceedings the doctrine of *res judicata* precludes relitigation of the same causes of action arising out of the same facts and matters as have been the subject of a previous judgment.

3.4.2 These doctrines operate to prevent repeat trials in either civil or criminal processes. There does not seem to be a principle as such that would prohibit relitigation of the same facts in different fora: for example preventing a civil case being brought on the same grounds as that brought in regulatory proceedings. This contrasts with the position in the US, where if the SEC obtains sanctions at a civil action that are deemed punitive rather than remedial against a defendant who has received a criminal punishment, the

[11] *R v. Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524, per Neill LJ at 531.

[12] It should be noted that adverse decisions made in civil and disciplinary proceedings will be of no probative value in criminal proceedings due to the higher standard of proof in the latter; and further such decisions are unlikely to be admitted in evidence as their prejudicial effect would generally outweigh their probative value.

[13] Criticism has focused particularly on *ex parte Brindle*: see Andenas, *op cit. 11;* Beloff and Lewis, *op cit. 11.*

defendant may assert his rights under the double jeopardy clause contained in the Fifth Amendment to the US Constitution.

4. Impact of Financial Services and Markets Bill on the present position

4.1 Under the Financial Services and Markets Bill it is proposed to give the FSA significantly enhanced powers of enforcement. The FSA will have the power to order any person found breaching the new proposed Code of Market Abuse to disgorge any profits made or loss avoided as a result of the breach and restore the position, or otherwise compensate, any identifiable victims of misconduct. It will have the power to order a person to pay a fine aimed at deterring such misconduct and pay the costs of the investigation. It will also be able to prosecute certain forms of market abuse, including insider dealing, market manipulation and money laundering.

5. Lord Irvine's proposed solution: the unified procedure

5.1 In his KPMG speech the Lord Chancellor expressed his concern about the delay inherent in our systems and in particular the impact on such delay of the European Convention on Human Rights as incorporated into English law by the Human Rights Act. He acknowledged that his ideas might raise more questions than they answered, but went on to outline a possible solution to the problems posed by the current complexity. He proposed a single set of proceedings which would be responsible for hearing criminal charges, producing reports from investigations, and imposing disciplinary sanctions on directors and professionals. The proceedings would be heard by a High Court judge and two expert assessors.

5.2 The criminal stage would be heard first, and a jury would sit for that stage. The judge and expert assessors would be encouraged to take an inquisitorial role and to ask detailed questions of witnesses. Once a verdict had been reached in that stage, the jury would be dismissed. The judge and expert assessors would then consider the remaining issues under less stringent rules of evidence. More of the story could thus come out. The judge and assessors could prepare a report akin to those which follow a Companies Act or Financial Services Act investigation, and/or provide for directors' disqualification. They could also determine regulatory sanctions, if the relevant regulatory body had agreed to join the proceedings and bring charges themselves. Civil proceedings would remain outside the unified procedure; they would have to wait until the conclusion of the unified procedure, however, before they could begin.

5.3 To ensure co-ordination of the appropriate bodies prior to the start of the procedure, the relevant regulatory and prosecuting authorities would be required to notify each other at an early stage that they were investigating the matter and considering taking action. They would also be required to pool information. Once the SFO had decided to bring criminal charges, the other authorities would have to decide within a reasonably short period of time (four months was the time suggested) whether or not they were going to join the procedure and bring charges themselves. The judge and expert assessors would be able to exercise powers of case management which now operate in civil litigation. If the criminal case were appealed, the Court of Appeal would be required to rule at an early stage and the rest of the unified procedure would have to be stayed until the appeal was heard.[14]

6. Assessing the proposals

6.1 The case for a single body to be responsible for judging and grading the many degrees of wrongdoing following the judge's decision on criminal liability in the Lord Chancellor's view is strong. The Working Group considers there are undoubted advantages in the unified procedure he has suggested, namely

- it would go some way to provide a safeguard against the Saunders situation on the basis that the regulatory investigation would take place after the criminal trial, although part of the investigative process would inevitably have to take place prior to the trial.
- witnesses and defendants would know for what purposes their evidence might be used as they would know who the participating bodies were.
- it would reduce overlap in the investigative and trial processes.

6.2 However in spite of these undoubted advantages, the Working Group identified a number of significant disadvantages:

6.2.1 *Delay*

Although the proposals are designed to reduce delay, it is not clear that they would achieve that end. All proceedings would have to queue up behind the criminal trial. Experience suggests that that trial could take a significant

[14] Note: the proposals are not entirely clear on this point, but this is a "best reading".

period of time to come to court [eg. Maxwell 3 ½ years]; there would thus be a corresponding delay in the hearing of the other proceedings. The Lord Chancellor drew attention to a recent case before the ECHR in which directors' disqualification proceedings were stayed until the end of the criminal trial. The ECHR found that this was an unacceptable delay and so was contrary to article 6 - the right to a trial within a reasonable time. The unified procedure would not relieve this problem; in fact in requiring that the criminal trial took priority in all instances it would to some extent be designing delay into the system.

Delay would further result from interposing the fact-finding investigations in proceedings that are for the purpose of imposing criminal penalties. The purpose of Companies Act investigations is to produce a report; this process can be extremely time consuming. Some of the facts would have been presented at trial. But if the current powers of obtaining evidence were retained and available to the assessors, they would be able to conduct a much more wide-ranging enquiry within the strict confines of the criminal trial. These days prosecutors are enjoined to keep the number of defendants to a minimum and to narrow the scope of the indictment, so, that the trial itself is not wide-ranging and can be completed in as short a time as possible. But the investigation will take time, indeed the time for completion of a report by inspectors under s.432 can vary between six months (County Natwest) and 10 years (Guinness)! It would be difficult, in the Working Group's view for a narrow trial and an investigation of much wider compass to co-exist at the trial stage.

6.2.2 ***The relationship between investigations and gathering evidence for trial is uncertain***

The unified procedure seeks to address the "Saunders problem". This is that the investigatory bodies have powers to compel the giving of oral or documentary evidence, thus abrogating the right of silence at the investigatory stage. Under the ECHR, and now the Human Rights Act, statements from a defendant cannot be used in a subsequent criminal trial as part of the case against that defendant. This means, therefore, that the investigators can obtain more information than can be used at trial. Under the unified procedure it is envisaged that this issue will be addressed as the investigation will now occur

after the trial has been heard. It has, however, to be recognised that investigations can have different purposes. Investigations under the Companies Act and Financial Services Act may be intended only to lead to a report or to disqualification proceedings, and so could be separated from the criminal process. However the powers of investigation are also used, and indeed were given, for the purpose of assisting the relevant bodies in discovering the pertinent facts and deciding what action should be taken including the possibility of bringing criminal charges; the consequences of the investigation therefore cannot always be known at the outset. Unless these bodies are no longer to have these powers the problem posed by *Saunders* still seems to arise.

6.2.3 ***The risk of inconsistent decisions (such as it poses an issue) is not averted, indeed it may be aggravated.***

Acquittal in the criminal trial may be seen to sit uneasily with subsequent decisions made by the same adjudicatory panel that regulatory sanctions should be imposed or that disqualification is merited. This could be so despite the different nature of the causes of action, rules of evidence and standards of proof that are involved in the different stages of the proceedings.

6.2.4 ***The unified procedure constitutes an enhancement of the criminal process and consequent prejudice to regulatory proceedings.***

In seeking to preserve the "purity" of the criminal process, the unified procedure could severely compromise the effectiveness of the regulatory process in a number of ways.

- The logic of the procedure requires regulators to wait until the SFO (or CPS) has made its decision on whether or not it will prosecute before regulators can take any action at all. This could take some considerable time. Then if the prosecuting authority does decide to proceed, the regulators have to wait until the end of the criminal trial and of the investigation before they can apply to the court to have the sanctions imposed.

- Under the unified procedure the decision on whether or not regulatory sanctions should be imposed becomes that of the newly configured court and ceases to be that of the regulator. One of the

main purposes in having separate regulatory bodies is that they provide expertise, and are thus better equipped to make determinations both on policy and on compliance than the courts. The unified procedure would tend to negate this purpose.

- The unified procedure compromises the regulator's ability to act swiftly and decisively to uphold the rules and enforce compliance, and, as such, would be contrary to the public interest. To the extent that there is a public interest in having a regulatory system at all, there is a corresponding interest in having that system enforced. Compromising the effectiveness of that system would thus compromise the public interest, and it is by no means clear that that compromise is justified by a desire simply to maintain the "purity" of the criminal justice process.

6.2.5 ***The advantages of the cumulative learning process may be exaggerated***

Unless the causes of action are very similar in the criminal and subsequent proceedings, or arise from the same facts, the benefits of the "learning process" will not be felt.

7. Some Solutions

7.1 The more the Working Group looked at the issues raised by parallel proceedings the more difficult the problems appeared to be. It seemed to the Working Group that the more it examined the Lord Chancellor's proposals the more the disadvantages appeared to outweigh the advantages. While the Working Group was very alive to the problems identified by the Lord Chancellor, there did not appear to be a single 'big idea' that would, at a stroke, solve the problems created by parallel proceedings. However in the course of the Working Group's research and discussions, to which the Lord Chancellor's speech was a very considerable catalyst, a number of ideas were considered which would, if pursued, be likely to reduce the inefficiency of parallel proceedings. They are referred to in this section in no particular order, save that they are divided into those which affect the investigation process and those which affect the proceedings stage.

Recommendations affecting investigations

7.2 First it must be said that the reform of financial services regulation as envisaged by the Financial Services and Markets Bill should have a considerable impact on parallel proceedings within the regulatory field itself. The Bill brings under the umbrella of a single body nine separate regulators operating under the present system. It will substantially reduce the need for multiple investigations.

7.3 Furthermore, as the powers of the Financial Services Authority and the SFO move closer together the opportunity for joint investigations will be increased compared with the position under the current "you first" process. As they are already members of FFIN there seems to be no good reason why other regulators such as The Law Society or the Accountants' Joint Disciplinary Scheme should not be co-opted into the process.

7.4 Investigations by DTI Inspectors under the Companies Act have been replaced in many cases by immediate investigations by the SFO. The SFO has similar powers of investigation to DTI Inspectors. The difference, however, is that, albeit after some time has elapsed, DTI Inspectors produce a report, whereas the SFO does not. DTI reports in the main have been of high quality and have shed light on the way in which misconduct has occurred and how measures to prevent it in future might be introduced both in terms of company law revision and City and boardroom practice. There would seem to be no reason why the SFO should not, in appropriate cases, and where DTI inspectors have not been appointed, be provided with the necessary extra powers and resources and be required to produce a report. It would probably not be possible for the report to be published prior to the end of the criminal trial, but that usually also applies to a DTI inspector's report. For the SFO, who will be investigating thoroughly for the purpose of the criminal proceedings, to produce a report, would avoid considerable duplication of effort. It would be a novel role for a prosecuting authority, but given that, unlike the CPS, the SFO also has responsibility and powers for investigation, in the absence of a DTI report, it is not perhaps an unreasonable expectation.

7.5 Unless there is intervention by the courts (as there was in the ***Brindle*** case), there is no reason in principle why criminal and regulatory investigations should not be started simultaneously, and, with sensible co-operation from both sides, progress satisfactorily in tandem.

7.6 Most criminal cases, including those relating to financial crime, are investigated by the police, but there does not appear to be a statutory "gateway" through which the police can pass the information to regulators. In ***Marcel and Others -v- Commissioner of Police of the Metropolis and others***, Browne-Wilkinson V-C (as he then was) said in relation to documents seized by the police:

> "It may be (though I do not decide) that there are other public authorities to which the documents can be disclosed, for example to City and other regulatory authorities ..."[15]

The Court of Appeal did not demur[16] ((1992) 1 All ER 72 at 81). Where the police work in conjunction with the SFO, information can be passed using the SFO's powers under Section 3 of the Criminal Justice Act 1987. But the SFO only investigates a relatively small number of cases of financial crime, albeit the most serious ones. The somewhat uncertain common law position outlined by Browne Wilksinon V-C is not satisfactory. A clear statutory gateway should be created and should result in avoiding further duplication of effort. Some would go even further and enable regulators to require criminal investigators to pass over information unless a judge otherwise directs. On balance, however, the Working Group considers it best to leave the decision to the prosecuting authority.

7.7 Since the ***Saunders*** case in the European Court of Human Rights there has been much discussion about the use of coercive powers to question people. However these powers have in practice, seldom been used in relation to those who are going to be defendants in criminal cases. Where coercive powers are used in relation to potential defendants at the investigatory stage it is now clear that the product cannot be put in evidence at the criminal trial.[17] Those powers are, in fact, used almost exclusively to interview those who will be witnesses at the criminal trial. There should be no difficulty in allowing a regulator to take part in such an interview in a criminal case, and indeed vice versa. In practice, it is likely that both regulators and prosecutors will prefer to leave the questioning to one or the other, provided that the transcript is made available to both.

[15] *Marcel and Others v Commissioner of Police of the Metropolis and others*, [1991] 1 All ER 845 at 852.

[16] *Marcel v Commissioner of Police of the Metropolis and others*, [1992] 1 All ER 72 at 81.

[17] Youth and Criminal Evidence Act 1999, section 59.

7.8 A similar approach is likely to be appropriate where documentary evidence is obtained either through Notices or Orders to produce, or through other coercive means such as search warrants. It is unlikely to be necessary for a representative of the other authority to be present, provided that the material can be shared as soon as possible afterwards.

7.9 A difficult problem arises in relation to evidence obtained by criminal investigators overseas. Often such evidence (particularly where it relates to bank accounts) is of great importance to others as well. Normally this evidence is passed to criminal investigators by the overseas authorities on the strict condition that it is only to be used in criminal cases. However irrational this may seem, it is the law in most countries. But change is taking place. Many financial services regulators have made arrangements with comparable bodies in other countries to enable information to be obtained and exchanged. Switzerland has recently enacted a law which permits material obtained by an overseas prosecutor also to be used in an administrative proceeding or civil case for damages arising out of the same subject matter as the criminal investigation[18]. There is a greater difficulty for non financial services regulators (such as those who discipline solicitors and accountants). But even they can make suitable arrangements. The Accountants' Joint Disciplinary Scheme has obtained evidence through a subpoena issued by the SEC; and is presently seeking banking material through the Swiss Banking Commission.

7.10 Self-inflicted problems can arise where regulators delay action, sometimes for years, on the basis that they have insufficient evidence to justify starting an investigation. The usual cause of such delay is undue passivity - failing proactively to seek out evidence from other investigators. In one case a professional body did nothing for five years after a complaint had been made, although throughout this period there was ample evidence at the DTI.

7.11 On the investigation side, therefore, with sensible co-operation, prosecutors and regulators can progress their investigations in tandem. It is less easy, however, to be so sanguine about civil litigants. Office holders and others will have some papers of their own on which to found litigation; but they may lack some of the "Crown Jewels" possessed by prosecutors and regulators. There is no doubt that, since the virtual demise of the DTI report, a very useful evidential tool for civil litigants has all but disappeared with nothing, save an SFO investigation, of which there is no report (see

[18] Article 67 of the Swiss Federal Law on International Mutual Assistance in Criminal Matters.

7.4 above) put in its place. The Working Group could, therefore, see no fundamental objection to allowing prosecutors and regulators to disclose information to a defrauded member of the public or office holder under the Insolvency Act 1986. This indeed was proposed by the SFO some years ago, but was not taken forward by other departments. The idea should be reconsidered, and, if there were found to be valid objections to disclosing information to civil claimants, the court could be given power to order the prosecutor to withhold it in an appropriate case.

Recommendations affecting the proceedings stage

7.12 It is accepted by all that nothing should be done to prejudice the fairness of criminal proceedings. But this does not mean that other proceedings cannot proceed simultaneously, or even before the criminal trial. In the ***Maxwell*** case this is exactly what happened to some of the civil litigation. Although there should be a presumption in favour of publication of the result of civil proceedings, if it is thought that the jury in the criminal case might be prejudiced by knowledge of it, then, as in the ***Maxwell*** case, the Court can prohibit publication of the evidence and the result of the civil case until the criminal proceedings are over. There is no reason in principle why regulatory and disciplinary proceedings against those who are not defendants in the criminal case should not proceed as soon as the regulators are ready. The result, if prejudicial to an accused, need not be published until the criminal proceedings are over.

7.13 Although there are exceptions, criminal courts have not always been willing to exercise their powers in the field of company director's disqualification, perhaps because it is a jurisdiction that is slightly esoteric and with which they are not very familiar. In order to encourage this jurisdiction to be used more frequently the Working Group makes four suggestions:

- First, the jurisdiction to disqualify under section 2 of the Company Directors Disqualification Act 1986 should not be limited to offences in connection with British companies. It should be possible to disqualify someone from being a director of a British company not only in respect of offences in connection with British companies, but also overseas companies. This could bring into the net those charged with offences in the UK who have made use of overseas companies, often in tax havens, for the purpose of carrying out a fraud.

- Secondly, it would be useful, at the sentencing stage, for specialised counsel instructed by the DTI to make submissions about disqualification, where the DTI thought the case was a suitable one for disqualification.

- When someone is dropped from, or acquitted in a criminal case, there is no reason why disqualification proceedings (if still appropriate) should not be continued immediately without waiting for the rest of the criminal case to finish. Prejudice can always be avoided by prohibiting publicity about the disqualification case until the criminal case is over.

- Once someone has been convicted of a relevant offence, he should be disqualified by the criminal court rather than be the subject of separate proceedings by the DTI. As far as other regulators are concerned, expulsion should be pretty well automatic after a criminal conviction.

7.14 Building on the precedent of disqualification, there is further scope for an expanded role for the judge in the criminal case. The Director of the SFO has suggested that criminal judges should be given some of the powers of regulators including intervention powers, which would enable them to close down businesses that are being fraudulently run; freezing assets before any criminal charge is made; imposing disqualification in circumstances akin to those under section 59 Financial Services Act 1986; and greater powers to order compensation for the victims of financial crime.

7.15 The advantages of this system, are that the trial judge would then be able to impose a comprehensive package: imprisonment, fine, compensation and disqualification, which the defendant would be able to consider and to which he could be advised to offer pleas knowing that there would be no scope for a regulator to take subsequent action. The Working Group strongly endorses the Director's views, and recommends that the issue of plea bargaining should be considered further.

7.16 It is by avoiding the contested trial, with all that that implies in terms of expense, consumption of time and manpower, that a plea of guilty represents the single most effective means of shortening the process. It has to be recognised that at present, many guilty defendants plead not guilty, taking their chance of an acquittal. That may be because in weighing up the odds they have no clear idea of what the sentence would be if they pleaded guilty. But if defendants could be told by the judge what the sentence would be on a plea of guilty, compared with the likely sentence after a contested trial,

so that they could know the saving in cost, anxiety and length of sentence, many more might plead guilty where the odds were against an acquittal.

7.17 A system is required which would encourage guilty defendants to plead, while at the same time protecting them from improper pressure to do so. The Seabrook Committee, appointed by the Bar Council some years ago, supported this idea, and suggested certain safeguards. These would ensure that any discussions would take place in the presence of the defendant and his advisers, and the discussions would in any case be recorded. There would also be a procedure for reading to the defendant a formal document setting out his rights and reminding him that he could not, and should not, plead guilty unless he accepted his guilt.

Such an arrangement would represent a substantial improvement on the present system. The American system, however, goes still further. In the United States it is possible to incorporate into the plea agreement regulatory penalties, which in suitable cases, after a plea of guilty in the criminal proceedings, will, together with a lesser sentence, satisfactorily meet the demands of justice. Such a procedure would fit well with the Director's suggestions referred to in 7.14 and in an appropriate case on a plea of guilty, the sentence could be a lesser prison sentence than might otherwise be expected, or even a conditional discharge. This idea was supported by Lord Runciman's Royal Commission on Criminal Justice reporting in 1993.[19] The conditions could include,

the payment of substantial fines;

the full co-operation of the defendant with the investigation;

the giving of evidence for the prosecution in a related case;

restitution to the victims of the fraud;

contribution to the costs of the investigation; and

regulatory penalties such as ceasing to do business in a particular market, or the closing down of a firm.

[19] Report of the Royal Commission on Criminal Justice, July 1993 paragraph 64 "..we would like it to be possible, given the necessary close cooperation between the prosecuting and regulatory authorities, for the decision to prosecute and the choice of charge to take into account the defendant's readiness to accept a sufficiently severe regulatory penalty in exchange for dropping the prosecution of reducing the charge. This would require the defendant's agreement to the regulatory penalty and, if he or she were to be prosecuted on a lesser charge, to pleading guilty to that charge."

It is understood that the regulatory authorities in the United States take part in the negotiation of the plea agreement. The attraction of achieving quickly and efficiently what otherwise might take months, or years, does not in the light of our own experience need to be emphasised.

8. Summary of Recommendations

8.1 That where possible the powers of regulatory and prosecuting authorities be harmonised and a single investigation be conducted jointly by those regulators and prosecuting authorities that have an interest in the matter.

8.2 That the SFO be given the necessary powers and resources to enable them in appropriate cases to produce reports of investigations for publication.

8.3 That the police should be given the powers by statute to pass information to regulators and insolvency office holders.

8.4 That other regulators and prosecuting authorities be given the powers to pass information to insolvency office holders and other civil claimants.

8.5 That where possible individuals should be interviewed jointly by prosecutors and regulators (where those bodies so wish) or that the interviewer be required to pass the transcript of interview to other regulators or prosecutors; the information contained in it to be available for use in the relevant proceedings, on the provisos, (i) that the individual has been informed that the information will be so transferred and used, and (ii) that it will only be passed to those who would have had the power to obtain it themselves (but see 8.1 above).

8.6 That information obtained under Notices or Orders to be automatically passed to other regulators and insolvency office holders on the same provisos as in paragraph 8.5.

8.7 That regulators take a proactive approach to seeking information from other regulators, and that overseas regulators be encouraged to permit information obtained by them to be passed to UK regulators and insolvency office holders for use in proceedings other than criminal proceedings.

8.8 That the powers to stay proceedings be used sparingly and that, where possible, multiple proceedings be allowed to proceed simultaneously, but that in appropriate

cases publication of proceedings and their result be withheld until the end of related proceedings.

8.9 That the Company Directors Disqualification Act 1986 be amended to permit disqualification of directors for offences committed in relation to overseas companies.

8.10 That criminal judges be given some of the powers of regulators.

8.11 That a revised system of plea bargaining be developed, with appropriate protections for defendants.

8.12 That regulators and regulatory sanctions be integrated into the plea bargaining process.

9. Conclusion

9.1 The recommendations above would go some way to address the principal concerns identified in paragraph 2.3 above, and in particular would reduce the burden on defendants in having to defend in a number of different fora at the same time.

9.2 The issues of duplication of resources would be met by harmonising powers, opening gateways for information sharing and by requiring the SFO to produce a report at the end of its investigation.

9.3 The issue of the multiple use of information gained initially for a single purpose and the conflicting roles of individuals in different processes would be addressed by giving individuals notice, at the time of the interview, of the persons to whom the information would be given and the purposes for which it would be used.

9.4 The issue of "spillover" effects and prejudice of proceedings would be addressed not by stay of proceedings, which would necessarily hinder the effectiveness of the proceedings stayed, but by non-publication of proceedings.

9.5 The issues of delay and inconsistency in proceedings would be addressed by broadening the range of sanctions that can be applied at the end of the criminal trial, integrating regulatory sanctions into the criminal process and the development of a system of plea bargaining which incorporates regulatory sanctions.

Appendix

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