



## **WORKING PARTY PAPERS**

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### **Proposals for Procedural Reform in Cases of Serious Fraud**

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## **Pre-Trial Procedures**

### **1. Introduction**

- 1.1. The existing pre-trial procedure for serious fraud cases is not working. Some particular problems identified by the working party are:
- 1.2. Trial judges are not assigned at an early enough stage and/or have insufficient time to read the papers before the start of the preparatory hearing.<sup>1</sup> The Roskill Report recognised the vital importance in serious fraud cases of assigning the judge as soon as possible after transfer to allow him/her sufficient time to get to grips with the case.<sup>2</sup> It is envisaged that our proposals for the improvement of pre-trial procedures will allow this to happen.
- 1.3. The start of the preparatory hearing is often delayed because of the statutory requirement to put the indictment at an early stage;<sup>3</sup>
- 1.4. Defence solicitors are reluctant to progress matters until the advice of leading counsel and experts has been obtained. Further delays are caused by the process of obtaining the extension of legal aid to cover these steps.
- 1.5. We have considered these and other problems and recommend several proposals aimed at making the trial of serious fraud cases more efficient and effective. Various working parties, royal commissions and committees have in the past identified many of the same shortcomings and reference is made below to their reports where appropriate. Where the practice and procedure of foreign jurisdictions is of relevance this is also noted.

### **2. Out-of-Court Meeting**

- 2.1. Significant legal cost and valuable time is wasted in attending at court for directions hearings and/or preparatory hearings before disputed issues have been identified. The failure to identify key issues and the absence of adequate procedural rules to effect their speedy resolution at an early stage were two of the causes of long trials identified

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<sup>1</sup> s. 7 Criminal Justice Act 1987.

<sup>2</sup> *Fraud Trials Committee Report* ('Roskill Report'), Chairman Lord Roskill, P.C., H.M.S.O., 1986 at p. 59 para. 4.46.

<sup>3</sup> s. 8 (2) Criminal Justice Act 1987.

in the 1992 *Consultation Paper on Long Criminal Trials* published by the Lord Chancellor's Department.<sup>4</sup> The root of the difficulty, which was identified in the Roskill Report, is that the parties are not required to communicate with each other about the case and preparation therefore often takes place without knowing what in fact is in issue.<sup>5</sup> Although the introduction of preparatory hearings – following the recommendations of the Roskill Report – was designed to cure this problem, a lack of communication persists *before* the hearing and consequently the problem has merely been displaced. The 1993 Royal Commission on Criminal Justice found that pre-trial hearings were often so complex that they were 'unlikely to achieve significant results without a great deal of preparation and prior consultation between the defence and prosecution, for which insufficient time is allowed'.<sup>6</sup>

2.2. It is therefore desirable that, by the time the case comes to court for the preparatory hearing, the parties should be able to present the assigned judge with a clear, agreed list of issues for his/her determination. In order to achieve this aim, we propose that a mandatory pre-trial meeting between the prosecution and the defence should take place before the preparatory hearing. The meeting should be held 28 days after the date of transfer. It should take place out of court but would otherwise be formal with a shorthand writer in attendance.

2.3. The matters which would be discussed at the out-of-court meeting which we propose would be:

2.3.1. Whether the case is likely to be contested (see para. 4 below);

2.3.2. The scope of admissions which can be made as to the movement of moneys, the production of documents, schedules and flow charts, chronologies, interviews *etc.*;

2.3.3. The identification of disputed issues of law and admissibility of evidence;

2.3.4. The production of unused material;

2.3.5. The production of a document for presentation to the court identifying the disputed issues for the assigned judge to resolve at the preparatory hearing.

2.4. If the meetings are to work properly, both the statement of evidence<sup>7</sup> and the transfer

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<sup>4</sup> *Op. cit.* at p. 5 para. 2.8.

<sup>5</sup> *Op. cit.* at p. 81 para. 6.6.

<sup>6</sup> Report of the Royal Commission on Criminal Justice, H.M.S.O., 1993, Cm 2263 at p. 104 para. 14.

<sup>7</sup> Prepared pursuant to reg. 4 (b) of the Criminal Justice Act 1987 (Notice of Transfer) Regulations 1988 (S.I. 1988 No. 1691).

charges<sup>8</sup> would have to be sufficiently detailed to enable the nature and scope of the prosecution's case to be readily identified by the defence. It is not anticipated that this should be problematic since these documents tend to be drafted by counsel. At present the defence's task in preparing their case is often made easier by the service of evidence before transfer; this practice should be encouraged in order to assist in achieving the purpose of the meeting.

- 2.5. It is envisaged that the procedure governing the out-of-court meeting would be set out in new Rules of Court. There would be liberty to apply to the assigned judge in the event of failure by any party to co-operate. An appropriate sanction for such failure would be a wasted costs order.<sup>9</sup> This power is currently available to the court to punish non-compliance with a requirement imposed at the preparatory hearing; however, it appears that it is not widely used for this purpose.<sup>10</sup> If pre-trial procedures are to be improved along the lines which we suggest it is essential that judges should be more ready to employ wasted costs orders in such a way as to ensure that effective sanctions exist to punish unreasonable failure to co-operate. Furthermore, we suggest that the Law Society and the Bar Council should regard such unreasonable failure giving rise to a wasted costs order as professional misconduct.

### 3. **Plea Bargaining**

- 3.1. The present informal practices relating to plea (or charge) bargaining has been described as a 'haphazard structure under which discussions sometimes take place *in camera* without solicitors (including in-house S.F.O. lawyers), police, or defendant being present [which] gives rise to enormous problems, maximises incoherence, and generates no precedent for dealing consistently and fairly with cases.'<sup>11</sup> We therefore think it necessary that, as part of the pre-trial out-of-court process, a formal procedure for plea bargaining should be established by Rules of Court. A defendant should be able to offer a guilty plea on the basis of the transfer charges which would trigger a response from the prosecution as to acceptability and a judicial indication as to likely sentence and discount for guilty plea. It is essential that the Rules of Court establishing this procedure require that the factual basis of the proposed plea be clearly set out and

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<sup>8</sup> Required by s. 5 (2) of the Criminal Justice Act 1987 to be specified in the notice of transfer.

<sup>9</sup> Under s. 19 of the Prosecution of Offences Act 1985. Such financial penalties are in use in other jurisdictions to ensure compliance with pre-trial procedures. For example, in Denmark fines are used to punish defending counsel for negligent or wilful misconduct in failing to make advance disclosure (Royal Commission on Criminal Justice, *Criminal Justice Systems in Other Jurisdictions* (Osner, Quinn, Crown (eds.)), H.M.S.O., 1993 at p. 77 para. 5.20).

<sup>10</sup> See the discussion in *Arlidge & Parry on Fraud*, Sweet & Maxwell, 1996 at p. 491-2 para. 14-086.

<sup>11</sup> Michael Levi, *The Investigation, Prosecution and Trial of Serious Fraud* (a report for the 1993 Royal Commission on Criminal Justice), H.M.S.O., 1993 at p. 197.

agreed before any judicial indication may be given. The procedure should be available to the defence at any time prior to the start of the trial.

- 3.2. Other jurisdictions vary widely in their attitudes to and procedures for plea bargaining. For example in Scotland and the Netherlands prosecutors may engage in plea bargaining independently of the judge while in Italy the judge may override any opposition by the prosecution which he/she believes unjustified.<sup>12</sup>

#### 4. **Preparatory Hearing**

- 4.1. The preparatory hearing should take place 28 days after the proposed out-of-court meeting. By this stage the assigned judge will have had sufficient opportunity to read the papers and the factual and legal issues will have been identified by the prosecution and defence in the out-of-court meeting. The hearing should address a number of matters. In particular, the judge should explore why any issue has not been agreed and remaining disputes should be resolved by judicial determination.

- 4.2. It may be necessary for the judge to conduct a *voire dire* at the preparatory hearing in order to decide a disputed issue of admissibility. It is, however, preferable that such hearings take place at this stage rather than during trial when jurors must be kept waiting. All other preliminary issues such as production of documents from third parties, sensitive material, issues of law, *etc.*, should also be decided during the course of the preparatory hearing.

#### 5. **Expert Evidence**

- 5.1. Experts should be encouraged to agree their evidence and to present the court with an agreed summary. Any differences which cannot be resolved by the expert witnesses and/or counsel should be the subject of rulings by the judge at the preparatory hearing.<sup>13</sup> The judge may have to hear evidence from the experts, for example where the expertise or integrity of an expert is impugned. Typical assertions tend to focus on conflict of interest, involvement in the arrest and search procedures and involvement in the drafting of charges. There is no reason why these issues cannot be resolved by the judge before the trial begins.

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<sup>12</sup> *Criminal Justice Systems in Other Jurisdictions* at p. 140-41 para. 10.38 and p. 149-50 para. 11.12-14.

<sup>13</sup> A similar recommendation was made by the 1993 Royal Commission at p. 158 para. 63.

## 6. **Defined Issues for the Jury**

- 6.1. During the course of the preparatory hearing the parties should be required to draft a list of issues for the jury to determine. The prosecution and the defence should then be required to prepare statements which address these issues. The Fraud Trials Committee in 1986 thought that it was in the interests of a clear and efficient trial for the defence to prepare their own case statement indicating the essential matters on which they join issue with the prosecution.<sup>14</sup> We agree and recommend that both the prosecution's and the defence's statements be given to the jury. We think that the considerations which led the Court of Appeal in *R. v. Mayhew*<sup>15</sup> to hold that giving case statements to the jury would be undesirable since it would lead to pleadings arguments would not apply to the documents we envisage which should be much more refined than the case statements presently employed.
- 6.2. We take the view that these documents should be given to the jury not at the conclusion of the evidence – as was recommended in the Roskill Report<sup>16</sup> – but at an appropriate point at the start of the trial. This measure, together with the proposals we make regarding opening speeches (see below, para. 12) will ensure that the jury can follow the evidence knowing exactly what it is they are being called upon to decide. Research carried out in 1986 by the Medical Research Council's Applied Psychology Unit at Cambridge suggested that if jurors were presented at the start of a trial with summaries of both the prosecution and defence cases, their ability to understand and to remember correctly the evidence would be significantly improved.<sup>17</sup>

## 7. **Substratum of Fact**

- 7.1. During the course of the preparatory hearing the parties should be required to draft a document which sets out a framework of the agreed facts. Again, this document should be presented to the jury in due course.

## 8. **Interlocutory Appeals**

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<sup>14</sup> Roskill Report at p. 112 para. 6.99. Henry J in his 1992 Child & Co. Lecture *Serious Fraud, Long Trials and Criminal Justice* also suggested that in each case a list of issues relevant to each defendant and each count ought to be prepared (at p. 15 – 16).

<sup>15</sup> Unreported, 18th November 1991, C.A. See *Archbold* (1998) at p. 157 para. 2-121.

<sup>16</sup> *Op. cit.* at p. 158 para. 9.13 (f).

<sup>17</sup> *Improving the Presentation of Information to Juries in Fraud Trials*, H.M.S.O., 1986 (see in particular p. 58). The work was carried

- 8.1. The present interlocutory appeal procedures are not working.<sup>18</sup> The issues which may be appealed are narrow and uncertain.<sup>19</sup> The appeals themselves are not always heard as a matter of urgency and often result in the trial date having to be vacated. This has the effect of causing considerable delay before a new trial date is fixed. Either the interlocutory appeal procedure should be abandoned or the Court of Appeal must embrace it more enthusiastically.

## **Trial Procedures**

### **9. Introduction**

- 9.1. We have considered the options for reform set out in the Home Office Consultation Document, *Juries in Serious Fraud Trials*, published in February 1998. For the reasons we give below (see paras. 16 *ff.*) we do not make any recommendation as to whether the right to jury trial should be removed from defendants in serious fraud cases. We propose instead several reforms of current trial procedures which, together with the pre-trial procedural improvements discussed above, we believe will achieve the proper balance between efficiency and fairness. They are designed to counter the perceived weaknesses of the jury system in this type of case while avoiding many of the pitfalls associated with alternative schemes.

- 9.2. We agree that the subject matter of serious fraud cases often leads to their presentation in a way which is excessively complicated and time-consuming.<sup>20</sup> We believe, however, that these failings can be rectified by modifying both the way in which juries are selected and the ways in which the case is presented to them.

### **10. Jury Selection**

- 10.1. The Juries Act 1974 does not adequately allow for the selection of jurors who are, by reason of their level of numeracy and literacy, capable of following the kind of evidence typically presented in serious fraud trials. Basic educational requirements are demanded of jurors in other jurisdictions; for example in France where jurors in all jury trials must be able to read and write. In England and Wales informal jury questionnaires have in the past been employed to identify and excuse jurors with obvious literacy problems (although this is not generally their primary purpose); the Maxwell trial is given in the 1998 consultation document as an example.<sup>21</sup> This practice

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out for the Fraud Trials Committee.

<sup>18</sup> The right of appeal is given by s. 9 (11) Criminal Justice Act 1987.

<sup>19</sup> See *Arlidge & Parry on Fraud* at p. 493-495 paras. 14-090-5.

<sup>20</sup> *Juries in Serious Fraud Trials* at p. 7 para. 2.13.

<sup>21</sup> *Juries in Serious Fraud Trials* at p. 21 para. 4.4.

should be formalised and expanded in order to set a basic threshold of literacy and numeracy for jurors in serious fraud cases. Rules of Court should therefore provide for a jury questionnaire to be formulated which would be specifically designed to test the literacy and numeracy of potential jurors.

## 11. **Infotech**

11.1. Greater use should be made of information technology in the conduct of serious fraud trials. Documents can be scanned onto disc by the prosecuting authorities and shown to the jury via computer screens. Similarly, flow charts and schedules can be presented to the jury on computer screen with great effect. With appropriate information technology, jury bundles containing core documents could be reduced to no more than one file in even the biggest cases.

11.1. Manuscript noting of evidence can be replaced by 'live-note'. The shorthand note is fed onto a personal computer operated by the Judge, barristers and solicitors who can 'flag' passages as they appear on screen. The length of the trial can be significantly shortened by the use of this technology. As well as relieving the Judge of the need to take a full note of evidence, the search facility saves enormous time in the preparation of closing speeches and summing-up.

## 12. **Speeches**

12.1. Rules of Court should be made which empower the judge to set time limits for speeches. The Fraud Trials Committee recognised the significant impact that prolixity on the part of counsel has on the length of fraud trials.<sup>22</sup> However, the committee was not satisfied that it would be feasible to fix limits which could take account of the different circumstances of each case.<sup>23</sup> We believe that, once the issues have been properly defined and clarified during the pre-trial process set out above, it should be a relatively straightforward task for the judge – who by this time will also have become fully acquainted with the papers – to set realistic time limits tailored to the requirements of the case. The judge's power to set such limits should apply to opening and closing speeches by both the prosecution and the defence.

12.2. To further assist in the jury's comprehension of the issues in the case, the trial should begin with a clear statement by both parties of their case. To this end the defence should be required to make an opening speech after the prosecution's opening speech;

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<sup>22</sup> *Roskill Report* at p. 167 para. 9.40.

<sup>23</sup> *Ibid.*

the right of the defence to make a speech at the close of the prosecution's case if they intend to call evidence as to fact other than that of the defendant should be removed. Skeletons of all speeches should be prepared for the jury.

### 13. **Summing-Up**

- 13.1. The jury should receive a written copy of the judge's directions on matters of law to take to the jury room, an innovation recommended in the 1993 Royal Commission's report<sup>24</sup> and also espoused by Henry J.<sup>25</sup> Again, Rules of Court could be employed to make provision for this.

### 14. **Research**

- 14.1. Research should be conducted to find out how jurors cope with serious fraud cases, in order to guide any future reforms. The Fraud Trials Committee explored whether it would be possible to ask individual jurors who had served on fraud trials how well they had understood the evidence; however, it was thought that such an inquiry would breach the spirit if not the letter of s. 8 of the Contempt of Court Act 1981.<sup>26</sup> Other bodies, including the 1993 Royal Commission on Criminal Justice, have also lamented the lack of reliable information as to the ability of jurors to understand cases. Short of legislative change, options for research are realistically limited to the use of 'shadow' juries or 'mock' juries.<sup>27</sup>

### 15. **Judges and Judicial Support**

- 15.1. It is essential to the efficiency of the pre-trial phase as well as of the trial itself that the judge should have fully familiarised himself with the case papers. Because of the weight of paper involved in cases of serious fraud, however, achieving this aim is often a highly onerous task. It is therefore desirable that judges should be given the appropriate resources to assist them in their management of cases. The proper provision of assistance to judges was recognised in the 1992 consultation paper as a priority in order to help them to control the trial and its length,<sup>28</sup> yet little has been done

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<sup>24</sup> *Op. cit.* at p. 135 para. 69.

<sup>25</sup> *Op. cit.* at p. 15.

<sup>26</sup> *Roskill Report* at p. 195 para.C17 and p. 201 para. 7.

<sup>27</sup> Some small-scale research involving a small number of individual volunteers was commissioned by the Fraud Trials Committee and is referred to above (see text at note 17).

<sup>28</sup> *Consultation Paper on Long Criminal Trials*, Lord Chancellor's Department, 1992 at p. 11 para. 4.3 and p. 20 para. 5.4.

to achieve this. We therefore propose that judges should receive the support of the appropriate information technology and, where necessary, training in its use. Each judge should also be allotted a judicial assistant. A pool of such judicial assistants could be established from barristers, solicitors and accountants in their early years of practice seconded to the post for a period of two years.

15.2. Judicial training should include greater exposure to accounting techniques and to the types of financial practice commonly encountered in cases of serious fraud. The criteria for assignment to the judicial panel licensed to try serious fraud cases should be published. Experience suggests that it is useful where Judges have practical experience in both criminal and civil jurisdictions. Continuing professional development courses for assigned judges ought to be encouraged and particular attention should be given to the practical demands of summing up in a long fraud case.

16. **‘Juries In Serious Fraud Trials’, Home Office Consultation Document, February 1998**

16.1. We consider that the ideas which underlie Chapter 7 of the Consultation Document point in the right direction but we do not believe that – with the exception of expert evidence – there are other areas of evidence which can be detached from jury trial and determined by a judge. Where there are disputed facts in fraud cases, the relationship between *actus reus* and *mens rea* is difficult to unravel.

16.2. It ought also to be borne in mind that dispensing with the jury in serious fraud trials may not achieve the anticipated savings in court time. As Peter Binning has noted, ‘some of the complex issues that would have formed the subject matter of the second Maxwell trial were fully ventilated in a civil case that lasted for nine months in 1993 before an experienced High Court judge’.<sup>29</sup>

16.3. Experience in some of the commonwealth jurisdictions which allow defendants to elect to be tried by a judge alone (for example the state of New South Wales in Australia and New Zealand) suggests that the judges there have come to think that public confidence in the criminal justice system may be eroded if controversial cases are routinely tried this way.<sup>30</sup> There is the added danger – set out in the consultation document – that confidence might be further eroded by a system which encourages the presentation of the case in a specialised way which may preclude its comprehension by the wider

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<sup>29</sup> Peter Binning, ‘Are Juries Essential’, *The Times*, 24th September 1996.

<sup>30</sup> *Ibid.*

public.<sup>31</sup>

- 16.4. We therefore consider that the extensive procedural reforms set out above should be made before further consideration is given to the removal of the right to jury trial in serious fraud cases. There is no consensus amongst members of the Fraud Advisory Panel as whether trial by jury should be removed in serious fraud cases and accordingly we do not put forward any recommendation in this regard.

21.10.98

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<sup>31</sup> *Juries in Serious Fraud Trials*, Home Office, 1998, at p. 11 para. 2.32 and see the Note of Dissent attached to the Roskill Report at p. 196 para. C20.