

The recent reforms in the area of fraud and financial crime amount to little more than re-arranging the deck chairs on the Titanic, writes **Jonathan Fisher QC**. More radical reform to the statutory framework is required

**A**ctivity in the area of fraud and financial crime is frenetic at the present time. In recent months the Attorney General has announced guidelines on plea discussions in cases of serious or complex fraud, the National Fraud Strategic Authority has published its annual strategy, the Financial Services Authority (“FSA”) has appointed Chief Criminal Counsel, and a merger between Revenue and Customs Prosecutions Office and the Crown Prosecution Service has been announced. These developments follow closely on the heels of the Serious Fraud Office (“SFO”) and the FSA making civil settlements in two large corruption cases. As if this activity was not enough, the former Director of Public Prosecutions (Sir Ken Macdonald) called for the establishment of a new regulatory enforcement authority to replace the FSA and the SFO.

It is perhaps no surprise that attention has focused on the efficacy of the legal response to fraud and financial crime. Enforcement authorities have experienced a torrid time in the investigation and prosecution of serious fraud cases, and with the recession and emergence of fraud on a scale hitherto previously unimagined, there is recognition that public confidence in the legal system will be seriously undermined if fraudsters and cheats continue to escape their just desserts.

Unfortunately, this outcome is entirely predictable in the absence of more fundamental change requiring legislation. At first blush the list of



Fisher: a unified approach required



# FIGHTING FRAUD

reforms sounds impressive but on closer examination it amounts to little more than re-arranging the deck chairs on the Titanic. If there is to be an effective response to the challenges presented by fraud and financial crime, more radical reform is required.

#### **Civil recovery, deferred prosecution and transparency**

The transfer of civil recovery powers from the Assets Recovery Agency to the SFO and other enforcement agencies enables them to offer a more creative response in fraud and financial crime cases. However, as the experience of the SFO in the Balfour Beatty case demonstrates, the statutory framework is wholly inadequate for this purpose. Balfour Beatty became a party to a consent order in the High Court to disgorge £2.25 million representing property obtained in respect of “payment irregularities” by a subsidiary entity involved with a building contract in Egypt.

The notion that the SFO should proceed in appropriate cases by way of civil recovery is welcome but in order to maintain public confidence the SFO’s actions must be transparent. This is not the case at the present time. There are no statutory criteria to be applied by an enforcement agency when deciding whether to initiate a criminal prosecution or pursue civil recovery as an alternative and it is unclear what factors were taken into account in the Balfour Beatty case. Also the way in which the disgorged sum came to be calculated was shrouded in mystery. Did the figure reflect the unlawful gain or was it the result of a private barter?

Attracting less publicity than Balfour Beatty, in January this year the FSA made a groundbreaking settlement with Aon Ltd, fining the company £5.25 million for failing to take reasonable care to establish effective systems to counter the risks of corruption associated with making payments to overseas firms and individuals. The FSA released more infor-

mation than the SFO about the way in which the settlement was reached but again the agreement was made behind closed doors. The FSA’s action was significant because the substance of the complaint related to corruption rather than market abuse or money laundering, but compared with enforcement action across the Atlantic the company got off lightly.

The US Department of Justice (“DoJ”) routinely makes civil settlements with corporate miscreants for colossal sums in an effort to avoid criminal prosecution. In one recent high profile settlement UBS agreed to pay \$780 million in fines, penalties, interest and restitution when compromising allegations that it had conspired to defraud the Internal Revenue Service. In addition UBS agreed to identify its tax evading customers and accepted a deferred prosecution agreement. Under the agreement UBS paid \$200 million of the \$780 million to the Securities and Exchange Commission (“SEC”) which had accused UBS of acting as an unregistered broker-dealer and investment adviser.

If the UK’s enforcement authorities are to replicate the US approach, a statutory framework must be established to facilitate the negotiation of deferred prosecution arrangements and obtain the supervisory approbation of the court. The public should be satisfied with nothing less, since secret justice is no justice. But it is also unfair on the enforcement authorities to expect them to combat the menace of international fraud and financial crime without affording them adequate weaponry for the job. A financial settlement lacks substance without a penal payment and the prospect of prosecution in the event of future wrongdoing.

#### **Investigation and disclosure**

In addition the statutory framework governing investigation and disclosure of unused material is inappro-

priate in fraud and financial crime cases. The Criminal Procedure and Investigations Act 1996 (“CPIA”) generally works well in criminal cases but it is clear “one size does not fit all”. Jessica De Grazia’s report (June 2008) into the workings of the SFO was correct in its assessment that CPIA requirements absorb disproportionate investigative resources fuelled by confusion over what constitutes “a reasonable line of enquiry”. The Government Fraud Review (July 2006) also noted strong criticism of the CPIA and pledged to reconsider the matter in 2008.

In fraud and financial crime cases an investigating authority must have sufficient flexibility to focus upon one or two areas of perceived criminality, without the requirement to review and schedule other voluminous material seized at the time of search which is peripheral to the areas of attention. Any modern business of moderate size operates multiple computers, hard drives and servers, and notwithstanding the ability of the authorities to image this material and devise software programmes for electronic searching, the review and scheduling process is incredibly labour intensive and frequently yields little or no tangible result.

De Grazia sensibly proposed a return to the “keys to the warehouse” approach. As she pointed out, this would vest decision-making in the party best equipped to decide what material is helpful or not. It is simple to administer and it is cost effective for Government provided that legal aid is effectively regulated. There is a role for the judiciary in determining the reasonableness of defence requests to review material for this purpose.

#### **A financial court**

The Government Fraud Review recommended that a Financial Court should be established. The Review contemplated an extension of High Court jurisdiction, staffed by a specialist cadre of judges with experience of financial issues. With

criminal and civil processes coalescing as the legal system responds to the challenges of fraud and financial crime cases, the need to establish a specialist court with adequate jurisdiction is strikingly obvious. Also, as the criminal justice system increasingly focuses on attacking criminal property the ability of a court to adjudicate on property rights becomes paramount. The feasibility of a unified approach

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was first canvassed by Lord Irvine in 1996 and reconsidered by Lord Justice Auld in September 2001 in his *Review of the Criminal Courts*.

The difficulties of split jurisdic-

tion were recently highlighted in *SFO v Lexi Holdings* (10.7.08) where variation of a restraint order made at the Old Bailey was sought. In the Court of Appeal Lord Justice Keene remarked that issues concerning beneficial interests, equitable charges and tracing were not part of the daily work of most Crown Court judges: "In other cases the sums involved may not warrant any unusual steps. But there may be other times when the complexities are such that it may not be wise for the Crown Court judge to embark on seeking to decide those issues. In such a case where a relaxation of a restraint order is sought, consideration should be given to adjourning those variation proceedings to enable the issues to be determined in proceedings before a specialist Chancery Circuit judge or High Court judge of the Chancery Division".

It is palpably absurd for jurisdic-

tion to be divided in this way. The Government cannot have it both ways. If both criminal and civil processes are deployed in tandem, either the Crown Court or the High Court's jurisdiction must be enlarged to deal holistically with the cases which arise.

#### Conclusion

The Government's blizzard of initiatives promoting change by accretion is not enough. Shifting lines of managerial responsibility from one State department to another and issuing more extra-statutory guidance and strategic plans sound good but far more radical reform is required. ❖

Jonathan Fisher QC is a practising barrister at 23 Essex Street, a visiting professor (corporate and financial crime) at the London School of Economics, general editor of *Lloyds Law Reports: Financial Crime*, and a trustee director of the Fraud Advisory Panel

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