

The Introduction of a Plea Negotiation Framework for Fraud Cases in England and Wales

Observations of the Criminal Sub Committee of the Council of HM Circuit Judges

- 1 We represent the Circuit Judges in England and Wales. Circuit Judges try the vast majority of criminal cases passing through the Crown Courts. Such cases include substantial cases of alleged fraud with which we have experience at our disposal.
- 2 We recognise the difficulties that the trial of such cases presents. Frequently such cases are protracted and expensive. Currently the costs are largely met from public funds and, as has been stated on many occasions, the greater part of the legal aid budget has been taken up by a few lengthy and difficult matters. Further the cost to the Courts and the prolonged stress for witnesses, victims and defendants must be borne in mind. We are generally supportive of proposals that would reduce the length and expense of these trials provided that whatever is introduced is fair and in the interests of justice. There have to be adequate safeguards. As we set out in paragraph 29 below we do not believe that it is appropriate for the Attorney General to seek to bind the Courts in Guidelines that may only be issued to prosecutors and our comments are subject to that important qualification.
- 3 A number of steps have been taken to ease the pressure in recent years. Changes in the way in which legal aid is managed in long cases has resulted in tighter controls. Protocols dealing with disclosure and long cases have been introduced. There have been changes in the way that the Courts operate which improve efficiency. Taken together these steps have already made a difference.
- 4 It is important to bear in mind that fraud cases have their own characteristics and problems. The vast majority of the larger fraud cases fall into the categories of corporate financial fraud or large scale scams. In the former defendants often believe that the sheer complexity of the matter is such that a Court will find it difficult to be sure of wrong doing. In the latter cases confidence tricksters often proceed on the basis that deceiving others is easily achieved. In both areas there are those who do not understand that their activities are regarded as dishonest by normal standards. There will always be a number who will contest a trial
- 5 There is already an opportunity for a defendant to seek an indication from the Court in accordance with the decision in *R v Goodyear*¹. The opportunity to seek an indication arises where there

¹ [2005] 2 Cr App R 20 CA

are, in effect, agreed facts, the history of the offender is known and the Judge is willing to indicate the maximum sentence that he might pass. The Judge may decline the opportunity to give an indication and the defendant need not plead guilty after an indication although if he contests the matter unsuccessfully he cannot expect the Court to honour the indication that was given. These principles apply to all cases including the longer cases so the need is to identify and evaluate whether there are any additional advantages and disadvantages in proposed plea negotiation². In reality the principle advantage may be an indication of plea at an earlier stage in proceedings than would be the position if a “Goodyear” indication were to be sought although only experience would show whether that is actually achieved.

- 6 We are also anxious to ensure that what is advanced as applicable to a particular type of case, for reasons attached to the complexity of trials in such cases, does not become a normal step in all cases.

Nothing herein should be interpreted as indicating that we believe there should be any extension of any “plea bargaining” framework, if such is adopted, to offences beyond serious or complex frauds. We do not believe that to be appropriate or desirable. We are fundamentally opposed. To an undesirable descent into “plea bargaining” in all types of case;

- 7 The advantage envisaged by the proposals is the identification of admissions and willingness to plead to offences at a very early stage so avoiding some of the expense that is incurred in preparing complex matters for Court. If such were possible there would be obvious cost benefits. This ideal is, however, subject to some very important qualifications:

- a. The vast majority of defendants do not consider pleading guilty until they are satisfied that the prosecution can prove a case against them. This manifests itself daily in the Crown Courts where defendant do not enter a plea or seek an indication until they are satisfied the prosecution can prove what they allege. In many cases that will extend to waiting until the witnesses actually attend at Court. There have been many initiatives over the years to persuade or cajole defendants into a different mindset, including the reductions for guilty plea and case management but the fact remains that many cases do not result in admissions until most, if not all, of the work has been done. Many initiatives to counter “cracked trials” have been undertaken in the past 10 years yet concerns remain in some quarters. It may be very unwise to proceed on the basis that defendants will make a

² For these purposes we have not taken account of Chapter 2 of the Serious Organised Crime and Police Act 2005 in relation to those who provide assistance to the prosecution.

rational decision based upon risk without knowing that there is a case to meet. Thus substantial savings in preparation costs may be illusory.

- b. Of course it may be said that if the inducement is sufficient the reluctance to plead before there is certainty that a case can be made out might be overcome. Again care is needed with this. The current Guidelines indicate that a reduction in sentence of one third is appropriate for a timely plea. Although there may be grounds for reducing that discount most Circuit Judges confronted with a defendant willing to plead guilty before the Court embarks upon a lengthy and costly exercise will allow the full reduction. If there is to be advantage in making admissions at an earlier point then the question of the appropriate reduction in sentence will have to be addressed. The consultation is envisaging pleas at a stage in advance of that at which it might be said the first reasonable opportunity would arise³. This may require consideration of the appropriate reduction in sentence to take account of the plea. If that were to result in substantially more than one third discount that may be open to criticism on the basis that defendants are being substantially under sentenced in cases of serious criminality. Clearly a defendant should not be prejudiced if he awaits full disclosure and a first appearance before the Court so that a defendant who does not enter a plea negotiation should not lose the discount if he subsequently pleads guilty at first appearance before the Court. If the reverse were to be introduced the plea negotiation would be seen to be “under pressure”. . A cynic might say that the advantage of early negotiation is not the discount in sentence but the opportunity to secure acceptance of lower criminality as set out in paragraph (c) below. The question of discount for plea is not, of course, a matter for guidelines to prosecutors issued by the Attorney General but falls to be considered by the Sentencing Guidelines Council or the Court of Appeal. We consider this will have to be resolved.
- c. There is a real need to ensure that the prosecution and defence are equally balanced. At an early stage in investigations it will be the defendant who knows the full details of what he has done and not the prosecution. If the aim is to reduce the high cost and delay inherent in the pursuit of complex fraud cases then there will be a real risk that a defendant, knowing the full extent of his criminality, will seek to negotiate a

³ See annex 1 to SGC Guidelie

favourable arrangement with the prosecution who are, at that stage, unaware. As the consultation correctly points out concealed evidence is a feature of fraud and those involved are not honest in their dealings with others. Of course the answer to that might be a refusal on the part of the prosecution to enter negotiations until full enquiries are complete but there may be great pressure to accept an early but perhaps unjust solution. A defendant is unlikely to agree to an arrangement that leaves the prosecution with the option of other charges later. The “longstop” of a refusal by the Judge to sanction the arrangement cannot resolve this difficulty since if the prosecution are unaware the Judge cannot be fully informed. We consider the position of the Judge further in relation to Question 2 and in paragraph 29 below.

- d. Similarly there is an obvious danger that the prosecution, particularly in high profile cases where there is pressure placed upon prosecutors, might seek to “over charge” in order to negotiate a plea to a lesser offence. In such a situation a defendant might be persuaded to accept an early but perhaps unjust solution; a problem that has been brought into sharp focus by experience in the USA. Again the ability of the Judge to refuse to sanction the arrangements may not overcome this difficulty
- e. Following on from that is the question of what savings might be achieved. Although the trial process is expensive and the costs incurred in legal aid are high we would not wish it to be thought that there would be substantial reductions in costs overall. It would be naïve to overlook the realities which we have touched upon at (a) above. Whilst a simplistic approach might suggest that costs could be capped that may not be the reality. Much of the prosecution cost is incurred in the investigation and marshalling of evidence. If the prosecution resist the temptation to negotiate before enquiries are properly completed the substantial costs will still be incurred. There will be savings in relation to formal matters such as proof of continuity or exhibits and in relation to trial costs but much of the expense will remain. The same might be said of defence costs. Defence legal advisers will need to know whether the prosecution can prove what is alleged before advising on plea negotiations and that will involve completing much of the preparatory work. Save in those cases where the astute defendant succeeds in taking advantage of the prosecution’s lack of a full picture, substantial defence costs will also accrue in any event.

- f. If, as we suspect, the costs of preparation will be incurred in any event in the vast majority of cases the savings will be in relation to formal matters and trial costs. If that is the practical reality then better use of “Goodyear” indications would achieve the savings without the need for a new procedure. We have no doubt that discussions already take place between the prosecution and the defence. Indeed a proportion of complex cases are actually resolved by acceptable pleas. In the remaining cases either there is a viable issue to be tried or the defendant takes his chances because he is unable to gauge the likely outcome of admissions. Progress might be achieved by indication of sentence. There would be further advantage and a greater prospect of resolution if it was possible to determine confiscation issues at the same time. There would be every encouragement for a defendant to plead if he had an indication of sentence and knowledge of the amount of confiscation that would be ordered. One of the weaknesses of the “package” advanced in this consultation is that matters of confiscation are not included and may be foremost in the minds of some defendants. In our experience where discussions resolve confiscation issues a resolution is much more likely to occur but if the question is not addressed the matter is more likely to go to trial.
- g. We accept that an informal procedure for discussions such as frequently take place in long cases may be open to some criticism on the grounds that it is informal and confidential. We do not, however, accept that it amounts to a practice that should be condemned because it is conducted in private. It would be inconceivable to prohibit informal discussion. Even were this proposal to be adopted the final stages that result in agreement are likely to be preceded by a great deal of informal discussion. Transparency throughout as a perceived advantage is illusory. There is much to be said for the current practice which frequently achieves a great deal in saving Court time, narrowing issues, agreeing evidence and, on occasions, admissions. Whatever may take place will be open to scrutiny when the results become known in the resolution of issues or bases of plea. We have no doubts as to the integrity of those involved who are answerable for their decisions. We do not subscribe to the view that these proposals can be justified on the basis that they result in a process that is “open and transparent”. In practice parties might be discouraged if all discussions were open and that would prove to be

counter productive. The reality behind this consultation is not a desire for openness and transparency but a desire to save costs.

- h. The present wording at 12.1 rather suggests that judicial approval is on an “all or nothing basis” with the Judge either accepting or rejecting the whole “package”. We question whether that is sensible and, in any event, do not believe that the Courts position and powers can be dealt with in this consultation. It may be that a rejection on sentence alone could be dealt with under 12.2 but what, for example, if the judge accepts the factual basis and the proposed sentencing range but not the suitability of the charge. We consider the position of the Judge further below.
- 8 We would not be impressed by a suggestion that the Courts in England and Wales should “import” an arrangement for plea negotiation based upon what is regarded as a normal feature of jurisdictions in the USA. Conditions in the USA are very different and although the system is “common law based” it has evolved in a very different way. There are concerns about unfair pressure, overcharging to secure a plea to something and a system that, in many instances, is based upon elected officials and elected judges answerable politically. We have only to look at the way that criminal justice has been used for political ends in the UK and the result that has had on the prison population to make the point. We do not consider that going down the route adopted in the USA will improve the quality of British Justice. Indeed it is more likely to undermine the high regard in which British Justice has been regarded until now. Whilst the consultation seeks to distinguish between “plea bargaining” and “plea negotiation” to many there will be no discernable difference.

Question 1 Do consultees consider that the proposed Plea Negotiation Framework adequately meets recommendation 62 of the Fraud Review?

- 9 Recommendation 62 clearly envisages a “plea bargaining” arrangement. To the extent that the proposed framework is stated to be “plea negotiation” and expressly not to be “plea bargaining” it does not meet the recommendation. To the extent that the framework represents a potential way forward it meets the principles behind the recommendation but that must be subject to the reservations we have expressed above and we remain of the view that an extension to the “Goodyear” principles would be the better option.
- 10 As indicated above there is a need to exercise great caution in commencing any discussions before charge when the parties may

not be on a level playing field and the advantage lies with the defendant.

Question 2 Do consultees consider that the Framework provides sufficient protection for the interests of society and the suspect for statements made and documents provided during the negotiation? If not what alternatives would be preferable?

- 11 This question rather underlines the point made above about the existing informal procedures for discussion.
- 12 The question introduces consideration of “without prejudice” statements in criminal proceedings to which the concept has never applied. “Goodyear” applications for an indication are not, of course, admissions since the indication is sought on a “what if” basis. A defendant will ask for an indication without admission. Something similar should underpin the proposed framework although we accept that full disclosure may be required on both sides before a “package” could be put together.
- 13 Although the framework envisages discussions in some cases commencing before charge it would be unusual for a suspect to be charged before interview under caution. What is said in such an interview is admissible subject to rules of law and evidence. Once an interview under caution is completed, or in some cases where an interview is not considered to be necessary, and there is sufficient evidence to charge the suspect no further interview may take place and, prima facie, any answers obtained from the suspect in relation to the matter are inadmissible. Information volunteered about other matters would not be subject to that safeguard. Thus if a suspect volunteers an admission of complicity in some other serious matter that would be admissible in proceedings relating to that matter. We see no reason to change that. Whilst some protection is required in relation to the matter under consideration that should not extend to other unrelated matters.
- 14 There may be substantial problems in cases where there are a number of defendants and we believe that judges would need to exercise great caution before accepting a “package” from one when others intend to proceed to trial. A judge could well be compromised by the facts ascertained from the evidence at the trial as it emerges. This is particularly true where the defendants seek to blame each other. Real injustice could result from the acceptance of a “package” agreed by one which turns out to fly in the face of the evidence or the verdict of a jury. We do not believe that there is sufficient “current practice” under sections 71 – 73 of the Serious Organised Crime and Police Act to justify the bold assertion at the end of the first paragraph on page 15 of the consultation. Further the suggestion that any “pre negotiation document” would be disclosable to co defendants overlooks the requirements in the

Criminal Procedure and Investigations Act 1996 which Courts are urged to uphold in the Disclosure Protocol.

- 15 Clearly if this is to work at all there must be the protection of some form of privilege on both sides so far as the discussion is concerned. Not only must the defendant be able to deal with matters in a way in which he would not at trial but the prosecution could not subsequently be held to concessions made in negotiation. There is need to modify clause 3 to reflect this. The parties should be free to agree a pre negotiation document and, prima facie, subsequent reliance upon anything declared therein to be “privileged” would be an abuse of the process. We leave open the question whether the terms of that pre negotiation document should be open to judicial approval.

- 16 On the face of it the safeguards for society appear to be the integrity of the prosecutor and the approval of the Judge. We make the point below that this consultation concerns guidelines to be given to prosecutors by the Attorney General which will regulate the way in which prosecutors respond and, as a result, influence the position of defendants. The way in which matters are approached by the Judge is not for the Attorney General to dictate. The Judge’s position is a matter for consideration in another exercise conducted elsewhere. Having said that it seems to us that the considerations that Judges may wish to reflect upon have a direct bearing on the extent to which the Judge’s approval or disapproval acts as a safeguard for the public. The paper stresses that the Framework is intended is to create a “fair and transparent plea agreement for consideration by the court, whose absolute discretion as to sentence remains entirely unaffected”. Further it states that “the Judge will be free to accept, amend or reject the agreement”. How is the judge to know what to accept or reject? What information will be available to the Judge and in what form? If the evidence is at a formulative stage and statements or reports are not concluded will the judge be sufficiently informed to make a decision? The concern must be that the decision to approve will be regarded as an endorsement of the prosecution decision behind which the prosecution may later seek shelter if further information reveals that the decision should not have been taken: for example where many more victims of a scam emerge and the decision related to what was advanced as a much smaller fraud. Then there is the potentially difficult situation that arises if the judge rejects the agreement and, after many more months of preparation and a six month trial, the defendant is acquitted? The approval of the Judge will have to be within clearly defined parameters and subject to practice directions governing the information to be made available and the matters the Judge should consider will have to be promulgated if Judges are to participate in a system such as that envisaged. Far wider consideration will have to be undertaken with regard to that.. Certainly we would not endorse the proposals as currently set out and this Framework

could not be adopted whilst these important aspects remain outstanding.

- 17 We appreciate, of course, the financial implications of cases such as those considered in this consultation but these should not drive the process. We are aware that the costs of legal processes and the public interest must be proportionate but it is often quite late in the process when it can truly be ascertained what is proportionate and what is not.

Question 3 Do consultees consider that the Framework adequately addresses disclosure issues and if no what alternatives can provide a better solution?

- 18 Whilst we agree with the views of the Working Group and accept that defendants would be unlikely to enter a negotiation without proper disclosure taking place we believe that some safeguards may be necessary. These proposals result in an entirely novel means of dealing with long or complex cases perhaps at a very early stage in investigation.
- 19 Where there is to be an interview under caution the practice is to prepare what is frequently described as a “disclosure pack” which identifies the nature of the prosecution case and the documents about which questions may be asked. Such would remain the position in the long and complex cases where an interview or interviews were conducted with the defendant. This provides a basic safeguard for a defendant who is interviewed. We agree that, in practice, a similar approach would have to be adopted by the prosecution if the prosecution initiate or agree to plea negotiation at any stage including before any interview takes place. Of course this is unlikely to cause any difficulty because the prosecution will seek to make the strength of their position clear in discussion.
- 20 The potential difficulty arises where there is a failure to disclose a document or documents that might assist the defence. The position once a defendant is charged is clearly set out in the Criminal Procedure and Investigations Act 1996. Once a defendant is charged the prosecution must disclose any material that might undermine the prosecution case. At that point the defendant may not know what material the prosecution might have that would fall into that category. In large and complex matters the recognition of what ought to be included depends upon the skill of the disclosure officer and the advice he receives. It is only after a defence statement is served that secondary disclosure takes place. At that point the prosecution must review the material against the defence case and make further disclosure of material that might assist the defence case. Again the effectiveness of this depends upon the skill of the disclosure officer but it is recognised that non disclosure can have very serious consequences for the prosecution.

- 21 We recognise that the way in which this Framework is being developed is intended to avoid the need for legislation by introducing the Framework as a practice document formalising and further encouraging discussions. That would be defeated as an object if the a statutory disclosure regime was introducing by an extension of the principles in the Criminal Procedure and Investigations Act 1996 were to be introduced. Without some form of regulation of direction, however, there would be a risk of deliberate or accidental unfairness. That is not answered by simply asserting that “*an offender properly represented would simply not enter or continue plea negotiations if he felt there had been inadequate disclosure*”. He may not know what material is available to the prosecution particularly if he is one of a number of defendants alleged to be involved. If a defendant is to have sufficient confidence in the process to engage in it then he must be satisfied that he has the sort of protection that the statute provides. Otherwise there is no point in negotiation before the statutory procedure is complete and early resolution will not occur. It seems to us, therefore, that the Framework should include provision for prosecution disclosure in the light of information provided by the defence and the stage to which the investigations have progressed. That should be supported by some certification given by the prosecution before negotiation is complete. The Framework might include a provision enabling a defendant to waive his right to such disclosure if, for example, he does not provide information about his case.
- 22 The agreement presented to the judge should contain the disclosure certificate signed by the prosecutor responsible and a certificate that the defendant accepts that disclosure has taken place unless he has waived disclosure. This would introduce the potential for consequences in the event of failure in disclosure.

Question 4 Do consultees consider that the Framework adequately ensures that victims can have confidence in the outcome of any plea agreement reached? If not what alternatives would provide better protection for victims?

- 23 We agree that the Framework adequately provides for this.

Question 5 Do consultees consider that judicial independence is sufficiently protected by the proposed Framework and if not what alternatives could be recommended?

- 24 We agree although we do not believe that the guidelines that are intended for prosecutors can affect the Judges who are independent of the Attorney General and not susceptible to guidelines promulgated by the Arrorney General

Question 6 Do consultees agree that the Framework ensures that the Crown are not prejudiced in presenting their case at trial

following a failure to reach a plea agreement or to reach one that is acceptable to the Court? If not what alternative mechanisms could be devised?

- 25 We note that there is the suggestion that confidence in the criminal justice system is thought to be undermined by the fact that there is only a 62% conviction rate amongst those who proceed to trial in complex fraud cases. We are bound to point out that we do not believe that using statistics in this way is ever helpful. Whilst the fact that 62% are convicted despite pleading not guilty might suggest to some that those who plead not guilty are “playing a game” there are others who would take a contrary view if 38% are, in fact acquitted. Statements of this sort are generally best avoided in the context of criminal justice suggesting, as they do, that all who are the subject of proceedings must be guilty when such is clearly not the case. Similarly the sort of emotive expression to be found at the bottom of page 19 and the top of page 20 is not appropriate when seeking a measured response to a procedure such as this however appealing it might appear to some.
- 26 The Framework provides for appropriate alternatives if the negotiated plea agreement is rejected. We would incline towards a timed Stay, such as is the position in civil proceedings where Part 26 of the Civil Procedure Rules allows for the grant of a stay during negotiations. This has the advantage that there is a timescale to which the parties should work. It avoids the risk of prejudice by delay or later arguments of abuse. If the case has progressed to the point where proceedings are commenced and discussions have taken place the prosecution should be in a position to indicate how much further time is required. In our experience witnesses and victims are often as, if not more, concerned to know that matters are progressing and finality will be reached within a timescale than about the outcome whatever that might be.

Question 7 Do consultees consider that the Framework adequately protects the rights of the suspect? If not what further alternative safeguards would be effective?

- 27 Subject to the points made above we consider the suspect’s position is safeguarded.

Question 8 Do consultees consider that the Framework addresses the relevant issues of principle that need to be considered prior to the introduction of a formal mechanism for plea negotiations in fraud cases into English Law.

- 28 The general tenor of the Framework is the encouragement to negotiate in appropriate cases so that a situation much like that envisaged in R v Goodyear might be reached. In this consultation the Framework is put forward as a more structured and focussed basis for discussions to take place between the parties if both parties

wish to engage. If that is the purpose of a Framework to be referred to in Guidelines to prosecutors then there is no “introduction” of a procedure into English law. It is recognised that discussions are already taking place in many cases.

- 29 A difficulty does arise in the sense that the Framework, whilst appropriate to govern the way in which prosecutors approach their task, seeks to bind Courts to respond in a particular fashion. We do not consider that can be achieved in Attorney General’s Guidelines. The Courts are quite independent of the Attorney General and prosecutors. Courts are free to exercise independent judgment in each case and that principle could not be fettered by Guidelines. Thus that part of the Framework to paragraph 8, excluding paragraph 2, may properly be the subject of Attorney General’s Guidelines. The remainder would have to be the subject of a Practice Direction and included by provision in the Criminal Procedure Rules subject to the inclusion of paragraph 15 which requires amendment to reflect that what are being advanced. Paragraphs 1, 3, 4, 5, 6, 7, 8 and 15 are guidelines to prosecutors. Any changes in the approach to be adopted by Judges would require separate consultation and provisions..

HH Judge David Swift
Chairman
Criminal Sub Committee
Council of HM Circuit Judges
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