Editorial

More of the same?

The pandemic has underlined in many countries society's extreme vulnerability to fraud. Whether it be swindlers bombarding vulnerable individuals to part with their life savings or selling "snake oil" as a protection from the virus, the underlying theme is always the selfish pursuit of greed at the expense of others. Of course, people do commit fraud for other reasons than monetary gain – we have recorded within the pages of this journal the terrible damage and anguish caused by so-called "romance fraud" – for example. While the fraudsters' objective may be in the short-term sexual rather than financial exploitation, the financial aspect is invariably none the less not too far down the line. The problem with characterising something as fraudulent is often the relatively slim and perhaps debatable line between what we just accept as a manifestation of greed – as opposed to something deserving of a legal or other punitive sanction. While most of us, I assume, deplore the incredible profits that some have reportedly made in selling or in many cases simply facilitating, the sale of protective equipment to the NHS it would seem that society does not regard this as a fraud. Indeed, many within or close to government appeared to have a degree of involvement – which some have challenged as a conflict of interest, but generally not as fraud. While in *R.* v. *McQuoid* [2009] EWCA Crim 1301 (10 June 2009) the Court of Appeal roundly condemned abusing inside information as fraud, jurists have in the past considered branding insider dealing fraud in the traditional legal sense as problematic (see generally, B. Rider, K. Alexander, S. Bazley and J. Bryant, Market Abuse and Insider Dealing (3rd ed), Bloomsbury, Ch 1).

The Fraud Act 2006 clarified much, but still we see very few cases of fraud taken up by the police, let alone pursued by prosecutors resulting in a conviction. Lord Roskill in the report of his committee on fraud trials back in 1986 considered that the public had no faith whatsoever in the criminal justice system bringing the perpetrators of serious fraud expeditiously and effectively to book. He confirmed that given the evidence – the public was correct. Of course, a lot has happened in terms of legislation, institutional change and co-operation since then. However, I sincerely doubt whether the attitude of the public has changed and the evidence would justify their lack of confidence in the efficacy of our criminal justice system. This is not to say that other criminal justice systems in the main do any better. We have explored various alternatives to the traditional approach of detection, investigation and prosecution within the criminal justice system. The creation of the civil offence of market abuse under the Financial Services and Markets Act 2000 is one – but in so far as it was based on a misunderstanding (at least in part) of the way the USA deals with securities frauds, it is perhaps not surprising it has not radically changed the view that insider manipulation and abuse is still an attractive sport! The experimentation by in particular the SFO with other US approaches, while perhaps to be commended in some degree, has generally met with scepticism in other parts of the justice system and especially the judiciary. Dealing with fraud and serious abuse through regulatory and disciplinary mechanisms also has some purchase, particularly viewed from the perspective of prevention and timely intervention. However, it does not invoke the stigma of a criminal conviction and may well be seen as little more than a "slap on the wrist" – the more so, given the usual target is a company's coffers.

There have been other strategies. For example, lowering or redefining the level of culpability justifying legal intervention – although this has been understandably resisted.

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There are very sound reasons why for conventional criminal liability there should be clear and compelling evidence, in the context of fraud – of at least, of dishonest recklessness. In the case of other financially relevant crimes, there might well be room for at least debate, on the appropriate threshold. While much was made at the time of the new offence in section 36 of the Financial Services (Banking Reform) Act 2013 imposing criminal liability for being involved, as a senior manager, in decisions which result in the failure of a financial institution – it remains debatable whether "gross negligence" would be sufficient for liability. There is also the approach in the Bribery Act 2010 and Criminal Finances Act 2017 of imposing criminal liability on companies on a strict liability basis, for bribery and tax fraud, but with a defence based on the defendant company showing that it had put a reasonably adequate compliance system in place. There are those who argue that this approach should be widened to other forms of financial crime and in particular money laundering. While this avoids the very real practical problems faced by prosecutors in fixing companies, under whatever theory in vogue, with *mens rea*, it – as with most of the other strategies, has resulted in a move away from individual responsibility – particularly where the expedient of a deferred prosecution agreement has been used.

There are those who take the view that by the time a serious fraud or abuse has come to light – often by accident, the crooks will be well out of jurisdiction and the money will have been laundered and rendered unrecoverable. Therefore, perhaps the law and especially the regulators should focus on the facilitators – professional and otherwise. The former head of the Economic Crime Command within the NCA, often asserted it was one of his ambitions to "nail" a partner in one of the leading law firms – not least to send out a message to the professions – without whose assistance – many forms of economic crime could not occur or would not be as profitable! While in my view a laudable strategy, for real criminal liability, rather than negotiated deals and putting people on "garden leave" in practice this has invariably appeared to be a "bridge too far" for prosecutors. Consequently, while of very real utility in disrupting and discouraging economic crime, it has not delivered the kind of scalps that would give the public confidence that things have changed since Lord Roskill's telling observations.

Indeed, adopting intelligence led interventions with the aim of disrupting criminal enterprises has produced real results. However, this process is often invisible and raises real issues of accountability and proportionality. The more we adopt approaches that obviate the supervision of the courts, the more we risk damage to our notions of the rule of law – and again, how can the public have confidence in the ability of the criminal justice system to bring fraudsters and launderers effectively and efficiently to book? Persuading economic criminals that it is too risky and costly to engage in criminal activity here, may well result in simply displacement – a sound enough strategy at a local police level, but hardly responsible in international terms.

The judges being well aware of these issues (see *Lane J., Fuseon Ltd* v. *Lord Chancellor* [2019] EWHC 126) have occasionally taken robust steps, particularly in civil cases, to deprive economic criminals of their ill-gotten gains (e.g. *Lord Templeman in AG for Hong Kong* v. *Reid* (1994) 1 All ER 1). Indeed, we have in the pages of this journal congratulated the judiciary in a number of cases involving issues of restitution, in fashioning the law so it does, subject to cost, offer a very effective tool for asset recovery and interdiction. However, while the civil law, like regulation, clearly has a role to play, it is not about brining criminals to justice.

There is no panacea or silver bullet. Fraud and abuse needs to be attacked at all levels, and the reasonable expectations of politicians, the media and the public must also be rendered rather more realistic. There is a real risk that draconian mechanisms might do

more harm than good to the economy, and we have already noted our propensity for own goals. Whether we could ever put sufficient specialist resources in to the fight is highly problematic. Not to entirely despair, I am convinced that education has a much greater role to play. Instead of providing role models bathed in greed we need to inculcate a more vibrant moral imperative condemning fraud, abuse of position and all that goes with it. The Independent Commission Against Corruption (ICAC) in Hong Kong faced with rampant corruption in fashioning its famous three pronged attack, placed considerable emphasis in educating in the schools, colleges and workplace as to the simple evil of corruption. While this strategy has been and continues to be tested in Hong Kong, it has in our context considerable potential. We have often bemoaned the lack of intellectual interest in the academy in regard to all aspects of economic crime, and this has no doubt resulted in an intellectual deficit in our national strategies and capabilities. We also need to do more than talk about commitment. The City of London in its various aspects talks a great deal about integrity but is very reluctant to actually do anything to promote it. I have made the observation before and I will make it again, the number of paying delegates from all aspects of the City, attending the annual Cambridge Symposium on Economic Crime – now in its 38th year is usually less than those from Fiji! When Tory ministers describe the City as one of the leading money laundering centres of the world you would have thought there would be real concern about reputation – unless of course, such branding is good for business – as usual.

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