

SERIOUS FRAUD

A glance at the future - An article by Jonathan Lennon and Aziz Rahman

The world's richest man, Warren Buffet, the American investor famously said "you can only find out whose swimming naked when the tide goes out." Around the time last year when we were all getting used to the dreaded phrase 'credit crunch' and its unpleasant consequences another American, Bernie Madoff, must have been worried that he, and probably hundreds of his investors, were about to be exposed by the fast receding tide. It seems he wasn't the only one with reason to worry. Readers may recall that Madoff admitted last December that the asset management arm of his firm was a giant 'Ponzi fraud'. These frauds are really very simple; you take money from one investor and pay it to an earlier investor pretending that that is the return on his investment. Inevitably such schemes must at some stage collapse but as a great deal of Madoff's clientele were charities they were in no rush to call in investments. Since Madoff there has been the Sir Allen Stanford scandal. He is another American billionaire and cricket magnate of Antigua. He is accused of fraud by the U.S. Securities and Exchange Commission (SEC). Unfortunately, it appears that much of the money he had invested with Maddoff - so the ripple effect of the credit crunch continues, and continues to these shores.

There is then no doubt that frauds are going to become more common-place; both because existing frauds will be exposed by the receding tide and new frauds too will emerge because of the simple reality that economic depression breeds greed and risk taking behaviour - by victims as well as fraudsters.

SERIOUS FRAUD OFFICE

The SFO was established in April 1988. Its remit has never been to prosecute all cases referred to it; it takes on the largest most complex cases, often with an international dimension and where the value of the fraud exceeds £1m. It has been extensively criticized over the years for the poor conviction rate in the cases they do prosecute; the conviction rates for SFO cases fell from 82% in 2002/03 to just 61% in 2007/08. Compare this to the American Manhattan District Attorney's Office, a similar agency with a conviction rate of 92%. There has long been a demand for a shake-up and the SFO was frequently compared to the American SEC and other agencies which were seen as tougher and more effective. That comparison now seems a little unfair given that America seems to be the birthplace of the credit crunch and greatest fraud of all time (Maddoff). The SEC is now under fire for failing

to prevent the Maddoff scandal.

With the American system in mind the SFO bought in Jessica de Grazia, a former US prosecutor, to undertake an extensive review of the SFO. Her report, published in June 2008, led to the resignation of the Director of the SFO.

The SFO has now refocused and there is a greater concentration on fraud prevention and the use of the civil courts. As the Solicitor General has recently pointed out when singing the SFO's praises the Office recently obtained its first ever Civil Recovery Order in a case in which the firm Balfour Beatty was required to pay £2.25m. This Civil Recovery Order route may be the way of the future, as discussed below. The SFO's case load at the moment, though never exactly lightweight, is more focussed on lower profile boiler room frauds, mortgage frauds and internet ticket sales scams. That said the new Director is recently on record as saying that the SFO is currently looking into 6 cases of alleged swindling by financial institutions including banks and has launched a major inquiry into the UK operation of AIG, the American insurance company.

The SFO has certainly got busier, by March the SFO will have bought 19 cases to Court, compared to only 7 this time last year.

INTERNATIONAL CO-OPERATION

The new Director of the SFO is promising a new age of international co-operation with similar agencies. This too marks a recent trend - in the recent Marine Hose case prosecuted by the Office of Fair Trading jail sentences were handed out to three British men accused of cartel offences. This was part of a carefully orchestrated operation on both sides of the Atlantic. The men were arrested in the States whilst the British authorities carried out raids at their business and home addresses here. Following a plea bargain in the US, the men returned to the UK in December 2007 to face arrest on charges of dishonestly bid rigging, market sharing and price fixing. The men pleaded guilty. The authors of this article were involved last year in a case (SEC v Manterfield) where the US SEC pursued a British hedge fund manager who is alleged by the U.S. authorities to have operated a fraudulent investment scheme in the United States. The SEC's website describes the unusual move of seeking a

freezing order from a foreign court; i.e. the High Court as Mr. Manterfield's held assets here. The SEC's application was challenged on a legal point - we claimed, amongst other issues, that the SEC's powers were in fact more like criminal powers than civil powers and therefore the English High Court could not assist the US authority which was in effect a wolf in sheep's clothing - a criminal body masquerading as a civil one. The case is now being considered for leave to the House of Lords.

It is clear though that as the world's finance authorities seem to be coming together more and more to tackle the credit crunch so the world's prosecutors and regulators of finance are more likely to seek each others help.

PLEA BARGAINING

Sir Ken McDonald, the ex Director of Public Prosecutions is recently on record (Times 23/2/09) as being critical of this country's effectiveness in prosecuting and regulating city fraud, as he says "mug someone in the street and you go to prison, but mug their savings and you can buy a yacht. It's a disgrace to justice". Sir Ken favours the merging of the City watchdog the Financial Services Authority and the SFO. These sorts of reforms have been suggested before but one particular demand that is being heard more and more is the demand for a formalised plea bargaining system.

In late 2007 the Government's Fraud Review made its recommendations. In response to Recommendation Number 62 on plea bargaining the Attorney General appointed a group to devise a plea negotiation framework for fraud cases. What is envisaged is an American style system where parties can go into confidential discussions and make admissions that cannot become evidence and which include written agreements guaranteeing a guilty plea in return for a recommended sentence being submitted to the Court. The idea has already been met with suspicion by the Judges who are wary of any removal of discretion. For our part we see inevitable problems. Especially in respect of suspects who naturally are mildly interested in talking to the opposition, only to find themselves being offered a deal that pretty much guarantees their liberty but at the cost of becoming a witness for the prosecution. There is obvious scope for injustice. Even innocent defendants can be seduced by the certainty of a guaranteed outcome, even if that outcome is unpleasant. In the end if the State has got a good enough case then it should forget about saving money by entering agreements and simply prosecute - the jury is the best guard against injustice and not all American imports are beneficial.

CIVIL RECOVERY

The authors have recently been involved in a lengthy trial of a man and woman accused of drug trafficking and money laundering. The alleged offences themselves took

place between 10 and 20 years ago in Spain and Portugal - in Portugal there were two trials and both were acquitted! The case was pursued here complete with evidence that would never normally be seen in a criminal court. Much of the evidence was in the form of hearsay account in witness statements. There was no jury. What kind of trial is this - answer a civil trial at the High Court. What the police could not prosecute in the UK for lack of evidence was pursued in the civil Courts by the Serious and Organised Crime Agency (SOCA) under its powers of Civil Recovery contained in the Proceeds of Crime Act 2002. We are seeing more and more of this.

SOCA's powers to claim civil recovery of what it claims to be the proceeds of crime has been extended to the major law enforcement agencies since April 2008. We have already mentioned the SFO who are now using this power. Customs and Excise too are starting to get used to the idea of pursuing a civil remedy. Their man does not go to jail but may lose everything he owns "all on the lower standard of proof of the balance of probabilities.

We await judgment in our case which may well turn out to be the leading case on limitation in historic civil recovery cases.

CRIMINAL TRIALS WITHOUT A JURY

Much of the foregoing may be read with increasing depression. Depression at the thought that the fight against crime seems to lead inevitably to an erosion of all our civil liberties - and in this new credit crunch world things could get even worse. Civil Recovery orders in the High Court, plea bargaining, what next? Well the Government has already tried to reduce the cost of fraud trials by introducing the notion of non-jury trials in complex criminal fraud cases. It is with great pleasure we report that the Fraud (Trial Without a Jury) Bill was voted down by the House of Lords in March 2007. In the midst of so much change and so many threats to our basic system of criminal justice it is a relief to see that one of our most established organs of the State is protecting our liberties.

AUTHORS

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