CLARE SIBSON QC & TOM ALLEN QC

PRAGMATISM AND THE PURSUIT OF JUSTICE

SFO
v
Petrofac Ltd
and
David Lufkin

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Cloth Fair Chambers was established in 2006 with the aim of bringing together a group of Queen's Counsel and leading juniors specialising in criminal, fraud and regulatory law.

Since then, members of chambers have been involved in most of the notable cases involving corporations, senior executives and high-profile individuals – very often involving multiple jurisdictions – who have either successfully avoided litigation altogether or developed the best strategic position in preparation for it.

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PRAGMATISM AND THE PURSUIT OF JUSTICE

SFO

v

Petrofac Ltd

and

David Lufkin

Clare Sibson QC *advised the Petrofac Group between 2017 and 2021. Between 1 and 11 October 2021, she represented Petrofac Ltd before the Westminster Magistrates Court and the Southwark Crown Court. She was instructed by Simmons & Simmons.* ***Tom Allen QC*** *represented David Lufkin in 2019 when he first pleaded guilty before the Southwark Crown Court. In October 2021, he represented Mr Lufkin at his sentencing hearing. He was instructed by Kevin Roberts of Cadwalader, Wickersham & Taft.*

In the decade between 2010 and 2020, the law and practice of corporate co-operation with criminal investigations advanced considerably. In 2010, handing down sentence in R v Innospec,[1] Thomas LJ spelt out the aversion of the English law to any plea agreement that sought to restrict the sentencing powers of the judge. In 2020, the Serious Fraud Office published comprehensive guidance on its approach – developed over six years – to Deferred Prosecution Agreements (DPAs),[2] a species of alternative resolution for corporate criminal cases, innovated by Parliament in the wake of Innospec.

The same decade saw no advance in the role that individuals play in the SFO's pursuit of convictions. The SFO has a track record of turning middle managers Queen's Evidence against high-ranking executives and the corporate bodies they serve. In 2011, for example, in the case of R v Forsyth and Mabey,[3] Richard Gledhill – a former sales manager at engineering firm Mabey & Johnson – pleaded guilty and gave evidence for the prosecution against two of the company's directors. In 2019, Lisa Osofsky, Director of the SFO, spoke about her intention to use individual suspects in a radically new way: as participating informants, equipped with secret recording devices, gathering evidence of on-going corporate crime. Commentators were sceptical and, to date, there has been no sign of implementation of this putative policy.

On 11 October 2021, in the Southwark Crown Court, without the help of the statutory DPA process, and with nothing like as dramatic as evidence from a wire-wearing CHIS,[4] Petrofac Ltd was sentenced to a total of £77 million in penalties for 7 offences of failure to prevent bribery in Iraq, Saudi Arabia, and the UAE, between 2011 and 2017. At the same time, David Lufkin (Petrofac's former Head of Global Sales) – who had made witness statements for the SFO, instrumental in the case against the company – was sentenced to two years' imprisonment suspended for 18 months.

In this paper we highlight the important – in some respects, the radical – evolution in the use of corporate plea agreements this case represents. We contrast the position of the corporate as against that of the individual defendant before the Court. We consider whether the time has come for the approach to sentencing flesh-and-blood defendants to undergo a similarly subtle but fundamental change and discuss the policy considerations which mitigate against such a development.

1 [2010] EW Misc 7 (EWCC). Nicholas Purnell QC, then Head of Cloth Fair Chambers, represented Innospec.

2 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/

3 John Kelsey-Fry and Jonathan Barnard (then junior counsel) of Cloth Fair Chambers, represented Charles Forsyth in the Crown Court and Court of Appeal. Nicholas Purnell QC and Clare Sibson (then junior counsel) of Cloth Fair Chambers, represented David Mabey in the Crown Court and Court of Appeal.

4 Covert Human Intelligence Source. See the Covert Human Intelligence (Criminal Conduct) 2021, and its predecessor, part 2 of Regulation of Investigatory Powers Act 2000.

THE PERSPECTIVE OF CORPORATE DEFENCE

DPAs were – without doubt – a valuable and necessary development in the way corporate defendants may be brought to justice. In 2010, the system was all but crying out for their introduction. They were heralded as a means by which the most co-operative corporate suspects might avoid formal conviction – and this outcome can be valuable to some companies some of the time, although given the comprehensive admissions the company is required to make in the DPA's Statement of Facts, the advantages of this 'avoidance' are often more apparent than real. Candidates for DPAs also enjoy the prospect of an enhanced discount in penalty, but since there is a statutory entitlement to a one-third discount for guilty pleas entered at the first opportunity in ordinary criminal proceedings, the 50% discount on penalty in a DPA process is not especially enticing.

The indisputable – usually, the decisive – attraction to a corporation considering entering DPA negotiations *is the ability to achieve certainty of outcome on penalty prior to accepting liability to pay it.* The single most valuable feature of the DPA process is the statutory mechanisms which enable a company to reach in-principle agreement with the SFO, not only on liability but also penalty, on a without prejudice basis. Judicial approval for that in-principle agreement is required, but this is sought in the first instance at a private hearing; only if the Court indicates at that hearing that the DPA *on its current terms* (including penalty) is likely to be in the interests of justice, is the company required to commit to the deal. Anyone who has ever sat on or advised a board facing criminal prosecution for offences which might – if proved – result in fines *alone* capable of pushing the company into insolvency, know the commercial worth of this certainty.

Quite rightly, this certainty can only be acquired for a price. The price is high. Before it even enters DPA negotiations, the corporate and those acting for it must commit to being completely transparent with the SFO about their own knowledge of the extent of the relevant corporate criminality. If in-principle agreement is reached, the same commitment to transparency must be given by the defendant and its representatives to the Court. There can be no complaint about this: justice demands it. Just as an *ex-parté* applicant may only seek injunctive relief if they undertake to be full and frank, so too a candidate for the dispensation of judicial approval of penalty in advance of acceptance of liability, arising from a private agreement, and put before the Court at a private hearing, must be full and frank. Until its final stages, the DPA process occurs, not *ex parté* the prosecution, but *ex parté* the public. A suspect may only embark on that process, with clean and open hands.

WHEN A DPA IS ATTRACTIVE

There are situations in which the price is well worth paying. The quintessential case in which *the corporate suspect itself will seek a DPA* is this:

- regardless of any future criminal investigation and setting aside all question of self-reporting to the SFO, the company is obliged to make the misconduct public immediately (for example because it involves a material misstatement of its accounts, and the company is a listed entity which must, in accordance with the Listing Rules, swiftly correct that misstatement);
- the extent of the criminal wrongdoing is capable of being quickly ascertained, across the entire group of companies affected;

- in view of the full extent of criminal wrongdoing uncovered, the total level of criminal penalty (including fine and confiscation) is of an order of magnitude which does *not* represent an existential threat to the company;
- public acceptance of that criminality in a DPA process does *not* carry with it other forms of existential risk (for example in the form of liability to shareholder action, or because of the inevitable collapse of a vital customer base) at an unacceptably high level.

Tesco Plc was in this position in 2014, after discovery of a significant misstatement within the accounts of its UK stores.[5] After making the necessary market announcements to correct the position, the company was able quickly to identify the full extent of its potential criminal liability across its international operations, isolate that at the level of one of its domestic subsidiaries and commit to a process involving full disclosure, in anticipation of an affordable penalty (eventually set at £129m), and a workable scheme for compensation of its shareholders (set at £85m, and to be administered by the FCA).

WHEN A DPA WON'T DO

Not every corporation which finds itself a person of interest to the SFO, enjoys the advantage of a context in which the invitation to "come clean and enter a DPA process" is so clearly attractive. There are situations in which an early invitation from the SFO to contemplate a DPA may be just as clearly unattractive to a corporate suspect.

A DPA will, invariably, be unattractive to a corporation when most, or all, of the following features are present:

- the first reports of suspected criminality emanate from outside the company;
- the company's legal advisors are faced with ambiguous evidence, capable of being reconciled with more than one set of underlying facts;
- the costs of a worldwide investigation itself will be high and may yield similarly inconclusive results;
- working capital, vital to the company's day-to-day operations, derives from the ongoing performance of live contracts which are implicated by the SFO's suspicions;
- were even one part of the SFO's suspicions proven to be true, the likely penalty and confiscation order might put the company's status as a going concern in immediate doubt; and
- acceptance of liability would carry other forms of existential threat, for example because the acceptance of wrongdoing by the corporate (or even one of its employees) is likely to wreck its ability to compete for work in one or more jurisdiction.

In such a situation, the company's best interests – indeed its survival – may depend upon its Board of Directors holding their nerve in the face of considerable pressure from the SFO, committing to co-operate with the SFO's *own* criminal investigation (for example by meeting requests for the provision of documents and facilitating section 2 interviews), but alongside that, making clear that the requirement will always be for the SFO to prove its case. A Board adopting

5 Clare Sibson QC, instructed by Kingsley Napley and Freshfields Braukhaus Deringer, advised and acted for Tesco Plc in respect of its accounting scandal between 2014 and 2019.

"I'm not going to lie to you. We've been having our share of legal problems."

this position cannot expect a DPA; in the circumstances described above, it is unlikely to view this as a loss.

PETROFAC LTD

From the perspective of 11 October 2021, looking back in time to when reports of corruption within the Petrofac Group first started to circulate in the press, an outside observer can sensibly infer that the Board of the Petrofac Group was, in 2016, in a position completely incomparable to that of Tesco Plc in 2014. What Board in Petrofac's position rationally could rush to seek to enter a DPA?

Between the two extremes of Tesco Plc in 2014, and Petrofac Ltd in 2016, many Boards find themselves in the very difficult position where the balance of risk and opportunity presented by a DPA process is far less clear.

THE INNOVATION OF THE PETROFAC PLEA AGREEMENT

To such Boards in future, what does the precedent of the plea agreement in R v Petrofac Ltd represent? What new opportunities are created by the stance taken by the SFO in relation to Petrofac?

The plea agreement between Petrofac and the SFO was innovative. The key innovations were as follows.

Firstly, a quick comparison between the number of section 1 Bribery Act offences to which David Lufkin had pleaded guilty (14) and the number of section 7 (failure to prevent) offences with which the company was charged (7) reveals that a large part of the potential case against the corporate had been cut away by the SFO, prior to the plea agreement

being reached. The SFO made clear in open court that the primary factor in its assessment of the public interest in this regard was affordability of the resulting fine. This pragmatic approach is commendable. If a company is willing to contemplate pleading guilty to a set of charges which already *could* (on a theoretical application of the relevant Sentencing Guideline[6]) put it out of business, what is the public interest in loading the indictment with offences to a level where the most lenient application of the same Guideline would result in the company going bust? *If* the assessment of the SFO is that the company *should* be permitted to survive, and if the company is willing to plead guilty to avoid the cost of trial to all parties, why would any sensible prosecution authority put the Board in a position where the directors' fiduciary duties to protect the interests of the company (by avoiding its liquidation) would prohibit it from entering pleas of guilty? Such considerations of affordability have previously been reflected within the agreed penalties put before the court for preliminary approval as DPAs. The SFO's approach to the prosecution of Petrofac enabled these considerations to be reflected in a non-statutory, plea agreement.

Secondly, the SFO – with considerable assistance from court staff in two court centres – made the practical arrangements necessary to allow the Company to be requisitioned, to sign the plea agreement and to appear in the Westminster Magistrates Court to indicate pleas and be sent for sentence *all on a single day*: Friday 1 October. The sentencing hearing was originally listed at the Southwark Crown Court for the next working day: Monday 3 October. Even with subsequent delay (caused by third party applications) the entire process was complete, and the company sentenced, within a week of that. Given Petrofac's listed status – and given the company's forward-facing plans to recapitalise (discussed below) – this choregraphed approach was a condition precedent to a viable plea agreement. Appreciation of market sensitivities and the need to control the dissemination of price sensitive information are built in to the DPA's statutory regime. The ability of the SFO and the Court to fast track this case to accommodate precisely the same sensitivities is an important precedent that will comfort Boards in similar situations in future.

Thirdly, the plea agreement was accompanied by Joint Submissions on Sentence, which indicated the parties' combined view of what the starting point for the fine should be. The Joint Submissions included – in respect of step 3 of the Sentencing Guideline – detailed calculations of a figure for harm (approx. £66 million). At step 4, the Joint Submissions included a culpability multiplier (of 300%). This enabled the parties to present a starting point for the total fine (approx. £197 million) prior to the step 5 step-back and the one-third discount for guilty pleas.

Again, this was not a DPA. Necessarily, the Joint Submissions were expressly caveated to recognise that neither party sought to fetter the Court. Petrofac had indicated its pleas of guilty in the Magistrates Court on 1 October with no guarantee of the view the Court would eventually reach. Nevertheless, in taking that leap, the Board of the Petrofac Group was no doubt greatly assisted by the SFO's willingness to interpret the Criminal Practice Direction (which prohibits the parties from presenting the Court with an "agreed sentence or range") as nevertheless permitting these specific suggestions to be made. (In effect, the parties submitted that the aim of the Practice

6 https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/corporate-offenders-fraud-bribery-and-money-laundering/

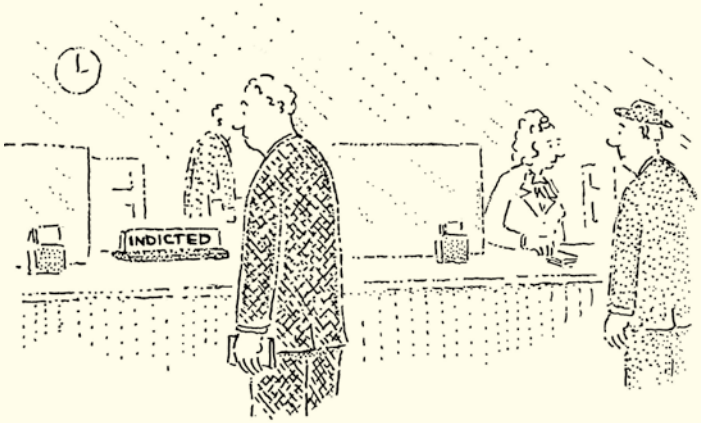
Direction was to prohibit agreements which purported to bind the Court; joint presentation of a suggested harm figure, and a culpability multiplier, to assist the court with the application of principle – not to mention maths – to complicated evidence, was permitted.)

Fourthly, the SFO went further by consenting to the defence advancing – in an annexe to the Joint Submissions on Sentence – unilateral submissions on an alternative means of calculating harm at stage 3, which would, if accepted by the Court, more than halve the starting point for the fine at stage 4 (a starting point of approx. £79 million, as opposed to £197 million, before the discount for early guilty pleas). These unilateral submissions adopted the approach of averaging (rather than simply aggregating) the individual harm figures for different counts within each of the three jurisdictions. The defence relied on principles encapsulated in steps 5 and 9 of the Sentencing Guideline (proportionality and totality), as well as the dicta of Leveson LJ in his judgment in SFO and Rolls-Royce.[7] In its proportionality arguments, Petrofac in particular relied on the fact that: disgorgement of the proceeds of its offending had already been achieved by way of confiscation (presented at step 2); and some of the offences were associated with the award of contracts which made large losses. HHJ Taylor largely accepted this unilateral submission, which was critical in bringing the eventual penalty (of fine and confiscation) down to the level the company believed it could afford to pay.

Fifthly, the SFO positively submitted to the Court that Petrofac should not face a penalty that would risk putting it out of business. The SFO justified this submission by reference to Petrofac's programme of corporate reform and its willingness to enter the plea agreement. It asked the judge to bear in mind, what the prospects for corporate co-operation with criminal investigations in future would be, were the Court to take a different view. This represented strong words from the prosecution in the English context, where investigative agencies are by culture and practice reticent to make such explicit recommendations to sentencing judges. It represented another innovation in favour of pragmatism, which can only have assisted the Board of Petrofac to take the leap of indicating guilty pleas to offences which could (on one application of the Sentencing Guidelines at least) have resulted in fines of over £500 million – a figure which would almost certainly have wiped the company out.

Finally, the SFO consented to Petrofac putting before the Court (in a second set of unilateral representations) an outline of its intentions to recapitalise and reduce its net debt. These plans, which included aspirations to raise new equity and issue new debt in the early part of 2022, were vital not only to help the company recover from the financial impact of the SFO's six-year investigation, falling oil prices in the same period and, more recently, the Covid pandemic; the company's plans were also essential to enable it to pay any fine without triggering potential foreclosure of its existing debt. This situation involved two different, agonising, catch-22s. In the first, Petrofac needed to obtain the certainty of the Court's judgment on sentence prior to renewing or replacing its debt facilities, due to end in 2022. However, the terms of each of its principal credit facilities either prohibited any part of the loan monies being used to pay a criminal fine, or worse (in the case of Petrofac's single biggest debt, a Covid Corporate Financing Facility from the Bank of England) purported to prevent the company

7 https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf. See paragraphs 88 and 89.



from meeting a criminal fine from *any* of its assets or reserves unless it *first* repaid the loan in *full*. In the second catch-22, the level of fine imposed on Petrofac would (naturally) affect the value of its shares, and the prospects of its successfully raising new equity in early 2022. But, absent certainty of the level of fine the court would impose, and publication of that figure to the markets at large, Petrofac was very significantly hampered in collating evidence of the very market reactions which were likely critically to influence its ability to pay.

Navigating each of these dilemmas was an exercise worthy of an article of its own. In the end, both the prosecution and the Court demonstrated a willingness to acknowledge the commercial realities of Petrofac's predicament. Although unable to verify the company's submissions on the topic of ability to pay, the SFO placed no obstacle in the way of their presentation. The Court accepted the defence submissions by granting Petrofac until February 2022 to pay the fine (by which time the company intended to have completed its recapitalisation). The fine was kept within the bounds of Petrofac's *estimated* ability to pay at that point, largely by reason of the Court's having adopted the alternative means of calculating harm, put forward by the defence.

For all these reasons, the plea agreement between Petrofac Ltd and the SFO, and the Joint Submissions on Sentence that accompanied it, were a demonstration of flexibility on the part of the prosecution and the Court. We suggest that the system is better for this flexibility. Boards of listed companies, which outside the process of a DPA are required to agree to plead guilty without the reassurance of foreknowledge of the sentencing judge's view on penalty, will derive assistance in future from the precedent the case sets.

THE PERSPECTIVE OF THE INDIVIDUAL DEFENDANT

In Court when Petrofac Ltd was sentenced, listening to the SFO and the company's submissions on the level of the company's fine, was David Lufkin, Petrofac's former Head of Global Sales.

David Lufkin was fully entitled to the first point made in mitigation on his behalf: that it was only because of his solid backbone that this case was before the Court at all. Many other individuals had been approached by the SFO in the early stages of their investigation, but the reactions had

always been the same – either to back off or, if pushed, to deny any, and all, responsibility.

But David Lufkin was different. He had immediately engaged with the prosecution when he was first contacted in mid 2017 and asked to return from the UAE to the UK for an interview. He was the prosecutor's dream – an open, intelligent, honest witness with a wealth of information to impart. Without even contacting his lawyers, he answered the SFO's call, took a plane and showed up at their offices. His position was clear. He would say what he knew and face the consequences. The decision he made at that early stage was a momentous one, which ultimately would lead to a non-custodial sentence, but which, over the course of the next four and half years, took a huge personal toll.

The process of engagement with the SFO started off at a canter, but as the months rolled by, it slowed. Returning permanently to the UK from Sharjah in December 2017, David Lufkin entered into a co-operation agreement[8] in June 2018. He gave a series of interviews under caution over the remaining months of 2018, which were to be the basis for the seven statements[9] he subsequently signed. And whilst he perhaps had appreciated that the cleansing process would be exhaustive, he could never have foreseen quite how physically and mentally intense the process would be – or for quite how much time he would be left to wonder what his eventual fate would be. Yet as 2018 slipped away and 2019 began, he was still hopeful that the end might be in sight.

In February 2019, David Lufkin signed a first set of statements, just prior to entering guilty pleas to eleven counts of bribery relating to events in Iraq and Saudi Arabia. But, despite his hopes that the fact of pleas might be the spur that was needed, he was once again left in limbo, while the SFO continued its investigation. The process dragged on through 2020, showing no signs of advancing much. He made more statements in 2020 and, in January 2021, David Lufkin went back to court, this time entering pleas of guilty to three more counts of bribery in a third jurisdiction, the UAE. He was now deeper in the mire than ever, struggling to cope financially and emotionally and without any concrete answer as to when the uncertainty about his future would end – or how.

At the time of entering his pleas of guilty in 2019 and 2021, David Lufkin had to do so *without* the benefit of any foresight of when (if ever) the SFO would be ready to charge the Company, or any other individual defendant. He was also left in ignorance of what the SFO would represent to the Court about his sentence. Like all those who sign co-operation agreements in this jurisdiction, he had to hold his nose, jump, and wait to see how he landed. For him, it was an agonisingly long fall.

The company, on the other hand, indicated its pleas of guilty on 1 October 2021 and was sentenced within ten days. Moreover, it indicated its pleas already with the benefit of written submissions from the SFO to the effect that it should be fined below the level that would put it at immediate risk of insolvency. At the sentencing hearing itself, prosecution counsel repeated this submission orally. At no stage did Mr Lufkin enjoy that reassurance. Even at the (from Mr Lufkin's perspective) very late stage of the sentencing hearing, the prosecution was not able positively to support the defence submission, that the Court should suspend Mr Lufkin's sentence of imprisonment.

8 Pursuant to section 73 of the Serious Organised Crime and Police Act 2005.

9 Totalling around 300 pages.

THE HISTORY OF QE IN FRAUD CASES

David Lufkin was not the first person, guilty of fraud or corruption, on whom the SFO had relied to give evidence in its case against others. In 2002 and 2003, in R v Regan and others[10] – the Co-operative Wholesale Society corruption case – the SFO relied on evidence from Ronald Zimmet, a former professional footballer who had brokered an agreement to pay bribes to two Co-op executives. He claimed to have done so on the instructions of Andrew Regan. The case against Regan failed, and Zimmet was badly discredited, because the SFO had secured both Zimmet's witness statements and his attendance at court with the promise of immunity from prosecution.[11] In that case the SFO learned what other prosecution agencies learned in the 1970s and 80s in a series of "supergrass" cases: the evidence of an admitted criminal may be worth little against anyone else he implicates, if it is obtained in exchange for a promise that he will not be punished. Subsequent to the case against Andrew Regan, Part 2 of the Serious Organised Crime and Police Act 2005 introduced statutory control over co-operation agreements between prosecuting authorities and individual suspects: both those that offer immunity from prosecution (section 71) and those that offer a reduction in an offender's sentence (section 73).

And so it was that almost ten years after the Regan case, Richard Gledhill was required to plead guilty to his own crimes prior to being called by the SFO to give evidence of UN sanction-violations against two executives of Mabey & Johnson. Gledhill was not sentenced until *after* the trial of his co-defendants. He received a suspended prison sentence.

10 Andrew Regan was represented by John Kelsey-Fry QC and Clare Sibson (then junior counsel) of Cloth Fair Chambers.

11 Mr Zimmet was an Israeli national, who could not be extradited to the UK.

JUSTICE THAT IS NOT SWIFT

The maxim of the criminal law is that punishment should be swift. Defendants who co-operate to the extent of turning Queen's Evidence in return for a reduction in their sentence endure delay in knowing their fate. This is for two reasons.

First, it is inevitably a condition of their agreement with the prosecution that any reduction in sentence is conditional upon their giving full and accurate evidence to the Court. As a general proposition, investigators will wish to see the terms of the agreement met – including (where necessary) by giving evidence on oath at the trial of co-defendants – before the sentencing Court gives the benefit of the discount.[12]

Secondly, it is widely believed that a co-operating defendant's credibility as a witness may depend – critically – upon his still being in peril of imprisonment at the time he gives evidence.

Like Richard Gledhill before him, David Lufkin's prison sentence was ultimately suspended. After entering a section 73 agreement, pleading guilty and being willing to give evidence for the prosecution, and after years of living with the prospect of imprisonment hanging over him, he did not spend one day inside a prison cell. It is a harsh but unavoidable reality that although a co-operating defendant can expect a very significant reduction in his sentence, he can have no guarantee of avoiding imprisonment prior to the day his sentence is passed.

12 There is, in section 74 of SOCPA, a discretion to refer the case of a co-operating defendant back to the sentencing court if, after they are sentenced, they fail to keep the terms of the agreement. It is a condition precedent of this discretion that the defendant is still serving the relevant sentence.

AN ADVANCE THAT MIGHT BE MADE

The slow pace at which serious fraud investigations proceed in this jurisdiction is so widely established – and tolerated – there is little point in observing that Mr Lufkin would have suffered less, had the SFO moved more quickly. And there may have been very good – perhaps unavoidable – reasons why it took the SFO 32 months after Mr Lufkin's arraignment to conclude its corporate investigation.

But there was something that might have been done, even after the Petrofac plea agreement was reached. In the two week period between the SFO *first* telling Mr Lufkin that there was to be a plea agreement with Petrofac Limited (and that he should therefore ready himself to be sentenced imminently) and the moment he was sentenced, it would have been some comfort to him to be reassured that – although unable to bind the Court – the investigative agency he had so greatly assisted would recommend to the sentencing judge: Mr Lufkin should not be sent to prison. Had this recommendation been made, it would have been particularly helpful to Mr Lufkin and his family in what was a particularly cruel weekend between mitigation being heard, and sentence being passed.

In view of the lengths to which the SFO was prepared to go to persuade the Court not to put Petrofac Limited at risk of liquidation, it is difficult to see what justification there could be – as a matter of policy and or as matter of pragmatism – for denying David Lufkin this. The Joint Submissions on Sentence put before the Court by Petrofac and the SFO read:

> "In supporting this submission [not to put the Company out of business], the SFO would ask the Court to consider that corporate responsibility and reform should be strongly encouraged, particularly in the context of acceptance of criminal conduct, as has been demonstrated by Petrofac... Whilst it is wholly a matter for the Court to determine step-back, the SFO would ask that the Court *considers the message to other corporate offenders in its assessment of this matter."* (Emphasis ours.)

In other words, if you – judge – put Petrofac Ltd into liquidation, no corporate offender looking at this Sentencing Guideline will ever co-operate, to any extent, with any bribery prosecution in this jurisdiction, ever again. It was equally true that, had David Lufkin been sent to prison, no competently advised individual would ever enter into a co-operation agreement with the SFO again. It is difficult to understand why it is currently deemed appropriate to make the first, but not the second of these realities, crystal clear to the Court. The need to retain tension in the relationship between the assisting offender, the prosecutor and the Court is essential. But when the lead times for investigations of this type run into the years (and sometimes the many years) during which assisting persons are left dangling on the end of a line, unable to know what will happen to them, real questions about the efficacy of the system arise. Who would choose to spend over four years in no man's land waiting to know whether the co-operation they had given – even if honest, full and leading to the convictions of others – would lead to freedom or incarceration?

David Lufkin made the right judgment call in terms of the outcome he received from the Court. But the length and uncertainty of the process shattered him personally. It is hard to see too many people in the future being advised to take (or actually taking) the leap of faith that David Lufkin took, without a process that is able to give more reassurance to someone like him. Whether this means prosecutors being able to make more robust submissions in support of assisting defendants, or judges giving indications on sentence

'I am at liberty to divulge! I am at liberty to divulge!"

at some earlier point after cleansing, the current balance weighs unfavourably against an individual defendant who is considering taking the plunge. Not engaging with the prosecution, staying out of the jurisdiction or even flat denial are considerably easier options than confessing to crimes committed and spending four years waiting to see if they lead to liberty or imprisonment. The risks of assisting must be worth it to the individual. And that could mean the difference between a corporate entity in Petrofac Ltd's position entering a guilty plea and paying tens of millions of pounds in fines, or walking away without sanction, free to carry on as before.

CONCLUSION

Co-operation between corporate suspects and the SFO has come a long way in the last ten years. It remains to be seen what will happen to the Director's plans to send participating informants into company headquarters to record live evidence of on-going crime. With or without such a startling development, the fact is that with the benefit of hindsight over David Lufkin's case, others in the same position as him in future may well decide they are better off doing nothing. If that is correct, policy must shift. The game of assist and reward must be a pragmatic one.

Pragmatism is not an anathema to justice; it is the balance between principle and pragmatism that enables workable policies of criminal justice to evolve and apply to the increasingly complex situations that prosecuting authorities bring before the Courts. We welcome the flexibility the system demonstrated in the resolution of the SFO's case against Petrofac Ltd. We suggest a little *more* flexibility should in future be shown to co-operating individuals.

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Cloth Fair Chambers specialises in fraud and commercial crime, complex and organised crime, regulatory and disciplinary matters, defamation and in broader litigation areas where specialist advocacy and advisory skills are required.

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