NICHOLAS PURNELL QC

THE RISK OF ABUSING A DOMINANT POSITION

THE NEED FOR A PROPER FRAMEWORK AND A TRANSPARENT POLICY FOR THE INVESTIGATION OF SERIOUS CRIMINAL OFFENCES

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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.

EDMUND LAWSON QC

(17 April 1948 – 26 March 2009)

Cloth Fair Chambers deeply regret the untimely death of Edmund Lawson QC on 26 March 2009. Edmund was a founder member of chambers and his contribution to the success of Cloth Fair was immeasurable. He was an extremely popular and brilliant barrister, admired greatly for his intelligence, generosity and humour. He will be greatly missed by us all and our hearts go out to his wife Christina Russell and his children.

If you would like to write a message in our book of condolences, please drop into chambers and sign the book we have available, or go to our online version at www.clothfairchambers.com

NICHOLAS PURNELL QC

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The culture of the investigation of serious criminal offences in England and Wales has been radically affected by three significant and welcome developments: the protocol entered into between the respective Attorneys-General of the US and of England and Wales regarding international co-operation in cases of mutual interest; the issue of the Attorney General's guidelines on Plea bargaining, effective from 4 May 2009 and the developing policy of the Director of the Serious Fraud Office in exploring alternative methods to the disposal of criminal investigations by way of negotiated pleas or other resolutions by corporate defendants.

These developments are as important as they are welcome and each of these measures has the capacity to bring about the more effective, economic and balanced administration of justice.

However, each also bears its own inherent dangers and I am concerned that there is an increasing risk that without a proper framework of guidelines and a transparency of policy the process may introduce some unintended risks of abuse.

Until the case of ***Goodyear*** in 2005, English law had for thirty five years vigorously turned its back on any procedure whereby the sentencer became involved in plea negotiations. This was a legacy of ***Turner***, a case in 1970, which put an end to the somewhat casual approaches defence counsel had customarily made to familiar judges to ask what the differential might be between the sentence for a plea of guilty and the sentence after a fight.

The reason for the exclusion of the sentencer from any plea bargain was that English law set its face against any judicial statement as to sentence forming part of the defendant's decision making process because of the undue pressure such pronouncements were seen inevitably to exert. The guilty plea had to be made voluntarily and solely on account of the defendant's acknowledgment of his responsibility for the offences charged. In ***Turner***, defence counsel's advice that, after seeing the judge, he was satisfied that on a plea the defendant might receive a non-custodial sentence but that after a trial he was at risk of prison was *"an indication that should never be given"*. The Court of Appeal confirmed that once such an indication had been given it was, from the defendant's perspective, *"really idle in the opinion of this court to think that he really had a free choice in the matter."*

Even as late as 2001, the Court of Appeal was still railing against plea-bargains. In ***A-G's Ref No 44 of 2000***, the lenient sentence, (imposed on a paedophile headmaster after an approach to the trial judge by prosecution and defence counsel) led the court to begin its judgment with the words: *"This case has a lamentable history. It demonstrates, at almost every turn, the wisdom of the authorities in this Court which have, for many years, set their face against plea-bargaining."*

By 2005, however, the ***Goodyear*** decision saw the five judge Court concluding that a very different culture now existed and that the time had come to reconsider ***Turner***. There was no inherent tension between the freedom of a voluntary plea from any improper pressure and an indication from the judge of his current view of the maximum sentence. The Court delivered guidelines to provide the right context – written instructions from the client for an indication to be sought in open court, the judge to provide only his current view of the maximum sentence for the case in question.

For an American audience, this must have a very quaint feel. The inability to bargain with a prosecutor against a clearly defined sentencing framework – in which it can be certain that the Court will endorse and impose the suggested sentencing outcome by reference to the agreed factual basis and the negotiated charges – would be unthinkable and thoroughly unworkable.

But for all the brave new world of the Attorney General's 2009 Guidelines and the SFO's invitation to negotiate disposal of complex cases, it remains the position in the Courts of England and Wales that a real tension still exists between the agreement that the prosecutor and the defendant may reach and the disposal that the trial judge may independently determine to be right.

It is clear that neither the judiciary nor criminal justice practitioners are yet willing to relinquish the cultural baggage that regards deals on sentence as a suspiciously unEnglish activity.

The overwhelming response to Lord Carter's 2007 proposal for considering the introduction into UK criminal practice of a variant of US sentencing grid guidelines was to roundly reject it and the conclusions in July 2008 of the Working Party set up by the Home Secretary and the Lord Chief Justice evidenced this. The force of the judicial response to the consultation exercise in particular was dramatically in opposition.

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Way too much information on your résumé

The ground breaking deal that was brokered so successfully for the parties in the ***Marine Hose Case (R v Whittle and others)***, in the summer of 2008, elicited a significant ripple of distaste in the English Court of Appeal. No-one could question that it was a very good deal for the defendants. Caught in incriminating circumstances in the US, arrested and detained in custody, the defendants negotiated simultaneous plea bargains for offences prosecuted by the DoJ in the US and the OFT in the UK. The deal was that they were to be sentenced in the US, returned to the UK, and plead guilty to offences in England. They would only return to serve the US sentences were they to receive sentences in the UK which were shorter than the sentences imposed in the US.

The one unknown was the sentence that the English Court might impose for a cartel offence which had never before been prosecuted. In the event, the UK Judge imposed a considerably higher sentence. The defendants appealed the sentences and argued that the additional period was excessive. Their dilemma was that a worse outcome might be achieved if the Court of Appeal were to reduce the sentence to a tariff below the US court. In those circumstances they would be rendered liable by their US plea agreement to be shipped back to the US to serve the difference in a US jail.

The Court noted that "*Part of the agreement*" (with the DoJ) "*was that each applicant would … not seek from the UK Court a sentence of imprisonment less than that provided for by the agreement.*" Giving the judgment of the Court, Lady Justice Hallett said: "*It follows that this court has not had the benefit of the kind of argument from counsel to which it is accustomed … their instructions were imposed upon them by the terms of the plea agreements. We have*

"Any chance of plea bargaining?"

our doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represent their clients in a UK court but having heard no argument on the subject we shall express no concluded view... .We have considerable misgivings about disposing of these applications in the way in which we intend but, if we are to avoid injustice, we feel we have no alternative."

The Court thus reduced the sentence to match the terms of imprisonment imposed in the US but by clear implication was expressing that this may have been a more severe sentence than might, but for the constraints of the US plea agreement, otherwise have been in the Court's sights.

Is this a good example of or a bad reflection upon the way in which the **"Guidance for handling criminal cases with concurrent jurisdiction between the United Kingdom and the United States of America"** is supposed to work? This 2007 Guidance issued jointly by then Attorneys-General of the UK and the US and the Lord Advocate for Scotland purports to set down advice for cases which have the potential to be prosecuted in both the UK and the US. "*The aim of such a co-operative approach is to agree a co-ordinated strategy in relation to the particular case that respects the individual jurisdictions but recognises the benefits of co-operation in these areas.*"

Plea bargains in these respective jurisdictions, however, are different animals with quite distinct characteristics.

In March 2009, the Attorney General in the UK issued her **Guidelines on Plea Discussions** – a topic so much more refined than grubby bargaining! "*These Guidelines set out a process by which a prosecutor may discuss an allegation of serious or complex fraud*" with a suspect or defendant.

"*The Guidelines will be followed by all prosecutors in England and Wales when conducting plea discussions in cases of serious or complex fraud.*" They came into force on, and apply to plea discussions **initiated** after, 5 May 2009.

If a UK prosecutor 'may discuss' a plea bargain and the guidelines 'will be followed' by all prosecutors in England and Wales, does that mean discussions regarding pleas before charge can **only** be conducted in accordance with the guidelines?

The guidelines significantly only apply to post 5 May 2009 discussions and equally significantly do not entirely accord with current and continuing practice of UK prosecutors regarding discussions initiated pre-May 2009.

If there are differences that matter between pre and post May 2009 negotiations, how should this affect any conclusions which are still to be reached? By reference to what 'code' will Courts dispose of proposed pleas which are yet to be considered by a court?

The guidelines contain a curious get out clause:

A8: *"These guidelines are not intended to prevent or discourage existing practices by which prosecutors and prosecuting advocates discuss cases with defence legal representatives* ***after*** *charge... to agree a basis for plea."*

I say two cheers for the Guidelines. They contain considered and reasonable safeguards for both prosecutors and defenders and set out a transparent process. They are subject to several crucial qualifications however.

A9: *"Where a plea agreement is reached, it remains entirely a matter for the court to decide how to deal with the case."*

D12: *"In the course of the plea discussions, the prosecutor must make it clear to the defence that the joint submission as to sentence (including confiscation) is not binding on the court."*

E5: *"the court retains an absolute discretion as to whether or not it sentences in accordance with the joint submission from the parties."*

This is a wholly different beast from its American cousin.

Where are the risks, other than the obvious one that nothing in the guidelines binds the Court?

Although the guidelines state that *'acting fairly'* means respecting the rights of the defendant *'and any other person who is...or may be prosecuted'* (paragraph B4), the prosecutor may rely upon information provided by the defendant in a prosecution of any other person (paragraph C8).

If the plea agreement is with an employing corporate entity, what is to be expected of the corporate defendant with regard to providing evidence against its employees? Without any UK equivalent of the Thompson Memoranda, excluding or limiting the use in the US of interviews by an employer of an employee, is it permissible for prosecuting authorities to require the waiver of privilege over such interviews? Or more aggressively, to seek to persuade employers to carry out such future interviews when the employee is deprived of the statutory safeguards which would apply in the case of a prosecutor's interview?

I would suggest it is not. The guidelines are silent. The established framework of US prosecutorial practice is absent. The prosecutors are feeling their way forward. The defence are uncertain how to respond. Yet the press statement released by the Attorney General in March

"I'm not a career criminal –
I'm more of a part-time volunteer"

emphasises that no assistance to the prosecution is required for a negotiated plea. This is in marked contrast to the position in the US. Since November 2008, DoJ investigators are acting under the guidance of the Phillips Memorandum which explicitly directs that no requests should be made of corporate suspects to waive privilege over interviews with individual employees.

No prosecuting department has issued a policy document or notes for guidance which shapes its own prosecutors' performance or provides a framework within which the defence can confidently approach the negotiations. Can we expect that the appointment of QC's as General Counsel to the Director of the Serious Fraud Office and as Principal Legal Adviser to the Director of Public Prosecutions will result in the publication of such guidance? I would expect and hope so.

The *'ancillary'* financial intricacies of plea negotiation are another area of concern. For a corporate defendant, for whom only financial penalties exist, such considerations are hardly ancillary. The A-G's Guidelines make specific reference to confiscation:

D 11 : *"Due regard should be had to the court's asset recovery powers... .The Proceeds of Crime Act 2002 requires the Court to proceed to the making of a confiscation order ... where the prosecutor asks the court to do so or the court believes that it is appropriate to do so."*

D 12: *"...the prosecutor must make it clear to the defence that the joint submission as to sentence (including confiscation) is not binding on the court."*

The problem is that a confiscation is not a fine. The Court has to arrive independently at the appropriate sentence for the offence admitted. The level of any fine will be determined by the Court. The prosecutor has an interest in confiscation because, in the case of the SFO and some other prosecutors, the prosecuting authority may retain a percentage of the sum confiscated. The (unknown) level of fine may severely impact on the assets available for confiscation. In times of public expenditure restrictions and cut backs, the pressure to look to negotiated pleas as a means of supplementing the necessary financial resources - which prosecuting authorities must find to meet ever increasing expenditure - creates an uncomfortable tension. How is the defendant company to be advised when any negotiation is subject to the Court's primary judicial duty to act independently?

This becomes exacerbated if two jurisdictions are competing to prosecute the same corporate defendant for connected matters or even worse for the same matter. If the purpose of a negotiated plea is to enable a case to be disposed of on a reduced but fair and just basis, how does the corporate defendant avoid becoming the meat in the sandwich over which two competing national prosecutors are squabbling? Each authority may genuinely intend to achieve a negotiated plea which leaves the corporate entity with a punished but viable future. However, once the actual ability of a corporate entity to pay is identified, by what protocol will the spoils be divided between competing national jurisdictions? Moreover, this is an area of pre-trial investigation with which none of the UK authorities has any real experience and none that compares with the extensive and recognised capability of the SEC upon whom the DoJ relies to perform this function in the US.

The distinctions between the UK and the US experience were highlighted by the Attorney General in her 18 March press release: "This plea negotiation framework is specifically designed for our criminal system and is not about offering discounts, immunity or incentives to fraudsters, it doesn't require a defendant to assist the prosecution and is careful to avoid a perception of plea

'bargaining' associated with the US. It highlights the importance of judicial discretion to agree, reject or alter the agreed plea and to impose an appropriate sentence."

In the same document, the Director of the Serious Fraud Office somewhat ruefully comments: *"Since I arrived at the SFO, I have been looking at ways in which we can sharpen up the tools available to us ... early plea negotiations are not the same as plea bargains in the United States, though I am keen to take what we usefully can from the American experience."*

I have some difficulty in reconciling the letter of the press release with the spirit of the guidelines themselves and yet more difficulty in accommodating the current prosecutorial practice within the proposed future application of the guidelines.

What is urgently needed is a comprehensive framework so that prosecutors and defenders are comfortable with the landscape they are entering. The issue of policy guidelines by the Serious Fraud Office might go some considerable way towards providing a more transparent system. The acceptance by the judiciary that these plea negotiations can properly lead to a joint and agreed basis for sentence is a more uncertain target. The proposition that prosecution and defence might participate to produce an outcome which inhibits the judge's appropriate sentence or presumes that the judge will dispose of the case in a specific manner is arguably a wholly unacceptable derogation from the independence and impartiality of the judiciary.

The risk is that policy is actually being developed on a case by case basis and that, **worse still**, in cases of cross border investigations, the Department of Justice wields the conductor's baton by reason of the length of its experience and the certainty – however draconian – of its plea bargaining structures.

It would be a matter of great regret should the brave new world heralded for UK investigations by the Attorney General in March become at risk to unintended institutional abuses by dominant authorities.

This article is a longer version of a paper delivered to the International Bar Association at its New York Conference in June 2009

CLARE SIBSON AND JONATHAN BARNARD

HELLO & GOODBYE

2009 has been a year of hellos and goodbyes. In May we have had the pleasure of welcoming two new members to Cloth Fair Chambers and we are delighted to announce the arrival of Jonathan Barnard (formerly of QEB Hollis Whiteman Chambers) and Clare Sibson (formerly of Matrix Chambers).

Jonathan and Clare represent the future generation of Cloth Fair Chambers and their arrival is in line with the business model that we designed at our inception - to maintain and, if appropriate expand, the membership ensuring a core of high quality, specialist barristers. Our aim is to remain a set of chambers whose membership wish to concentrate upon the provision of advisory and advocacy services at the highest level within the unique model of Cloth Fair Chambers.

JULIAN BEVAN QC

In February 2009 we said farewell to Julian Bevan QC. Julian was a founding member of chambers and we were sorry to see him go. Following a short sabbatical, he is planning to resume his practice at 9-12 Bell Yard Chambers.

EDMUND LAWSON QC

On 26 March 2009 we lost the much-loved Edmund Lawson QC. Our farewell to Ed appears on page 3 of this issue.

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