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THE INSIDER

Some questions around a suggested introduction of covert recording in the fight against financial crime.

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

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"Under new business, is anyone wearing a wire?"

The Evening Standard published an article, on 26 April 2019, summarising the plans of the Director of the SFO, Lisa Osofsky, to tell *'offenders'* that: '*You can spend 20 years in jail for what you did or wear a wire and work with us'.* It was received with a degree of surprise by the white collar defence community. Some wondered, is this the first step towards a dystopian new world of state-sponsored entrapment or merely the Director pondering out loud as she seeks to modernise and fortify her office? Either way, as she said more recently, *'it is not always possible to gather legally sufficient evidence, even against someone whom you reasonably suspect has committed a crime*'.[1]

First, analysis is needed of what Ms Osofsky was saying in April and whether there is legislation, already in existence, which provides the SFO with the powers to put her suggestion into practice. The Director's statement can be broken down into a proffer and a condition. The proffer to suspects that they should work with the SFO or face 20 years in jail is likely to be a reference to the situation where an individual who wants to co-operate enters into one of the categories of immunity or leniency agreements contained in part 2 of the Serious Organised Crime and Police Act 2005 ('SOCPA'). The condition that the '*offender*' should agree to '*wear a wire*' would attach to the immunity agreement. All of this would be in order that the suspect '*work with us*' which must mean that the suspect would wear the wire to uncover information or evidence. He would return to the 'scene of the crime' and record ongoing conduct or the confession(s) of former associates as 'the inside man'.

Whilst the proposed use of wire recordings is unconventional for an English prosecuting authority, it is not the first time a Director of the SFO has considered using some method of covert recording in the fight against financial crime. In 2013, the then Director, David Green, proclaimed that the SFO could use its powers under the Regulation of Investigatory Powers Act 2000 ('RIPA') as part of its evidence-gathering procedures. RIPA powers have been used by the police, security services and other public authorities to obtain information and intelligence for years. In addition, law enforcement has used RIPA to authorise undercover agents to go inside criminal enterprises acting as Covert Human Intelligence Sources ('CHIS') to obtain evidence, in cases where otherwise there would be none, by means of covert recordings of crimes.[2] The new Director, as a former FBI lawyer,

1 Speech of Lisa Osofsky to the Cambridge Symposium, 2 September 2019, as published on the SFO website.

2 S.26(8) RIPA 2000.

is no doubt familiar with US covert recording practices. Is it surprising that she evaluated the surveillance powers available to the SFO?

This article will consider how a superficial marriage between the SOCPA immunity regime and RIPA powers appears to provide some legal basis for Ms Osofsky's remarks to the Evening Standard. As part of that examination, it will address the key question for the Director: whether the evidence which the co-operating witness may obtain whilst wearing a wire is so significant that it warrants the use of such powers. An offer of an immunity agreement is reserved for exceptional cases, ones which would otherwise be unlikely to be prosecuted were it not for the assistance provided by the person to whom the immunity is offered. It must be in the public interest and it must be something which the discriminating public, as represented on a jury, can regard as justified. Likewise, the use of RIPA to breach a person's right to privacy and his right to personal relationships involves similar stringent public interest requirement tests. These are not powers to be used lightly. The risks to an SFO case if the consequences go wrong have to be assessed. In the event, for example, that the witness seeks to entrap his former colleagues into confessions or oversteps his remit in some other serious way, the SFO may find that an otherwise arguable prosecution case has been destroyed.

Before analysing the current UK powers, the question arises what does the SFO hope to achieve? What is the success rate of the use of suspect made covert recordings in the USA? Since the US Supreme Court decision in United States v White, 401 U.S. (1971), when the Court held that the use of covert electronic recording of private conversations did not violate the fourth amendment of the Constitution, the practice has been effectively used in a series of high profile cases. This article will examine two of those cases and explore whether the use of covert recording would be as effective if used within the English criminal justice system.

SUCCESSES OVER THE POND – THE CARROT

In her account to the Evening Standard, Ms Osofsky made reference to a suspect wearing a wire in the USA successfully to expose corruption inside football's world governing body, FIFA. She was referring to Chuck Blazer, executive Vice President of the US Soccer Federation and a FIFA executive committee member, who co-operated with the US authorities in relation to suspected corruption at FIFA. In 2011, Blazer was stopped by an FBI agent as he travelled on a motorised scooter in Manhattan and is said to have been told, *'We can take you away in handcuffs now, or you can co-operate'*.[3] Blazer chose to co-operate. In addition to providing information, he allowed his emails and phone calls to be monitored and wore a covert recording device (disguised as a key chain) when he attended meetings at the London Olympic Games in 2012. Although Blazer pleaded guilty to conspiracies involving racketeering, wire fraud and money laundering, amongst others, and forfeited $1.96million, he was never sentenced. Press coverage indicates that US prosecutors were able to bring charges against over 40 football officials and other individuals – the implication being that evidence obtained through Blazer's cooperation was

3 *'Chuck Blazer, Central Figure in FIFA Scandal, Dies at 72'*, The New York Times, 13 July 2017.

significant at least. After his death in 2017, his lawyer said that Blazer had hoped his co-operation with authorities would bring '*transparency, accountability and fair play*' to the sport.[4] However, the press had not been so kind in the years preceding. The media focus was on his failure to pay tax, his personal gains from corruption and luxury lifestyle suggesting that he had no choice but to become an informant.[5]

Another high profile example of the use of witness-made covert recordings can be found in one of the largest insider trading cases in the US. After an investigation lasting 12 years, Raj Rajaratnam, co-founder of the Galleon Group, and other individuals, were successfully prosecuted. Rajaratnam was sentenced to 11 years imprisonment. The case against him had included evidence from a co-operating witness, Roomy Khan, who had covertly recorded conversations with him. Ms Khan herself was sentenced to one year in prison. In one interview, Khan recounted how she worked undercover for the FBI for six years but said that she was *'pressured to confess and tell on my colleagues and friends, I was severely conflicted. While the prosecutors were threatening me with a very long prison sentence, I was feeling the visceral guilt: "I am toxic"*. She also refers to being a *'pariah'* citing the *'ignominy and loneliness'* of her choice.[6] In a later autobiographical article about her experience, she described the fallout after she was publicly identified as the co-operating witness. She wrote that her life turned into a media frenzy, how she was described in the press as an *'overweight, harridan and a narc'* and how *'the markets that I once loved, now despised me'*.[7]

Interviews and media articles about these investigations reveal a lack of sympathy with both Blazer and Khan because of their decisions to co-operate and wear a wire to record the conduct of others. A stern prosecutor may say that the hardships they each faced primarily arose from their criminal conduct rather than from their co-operation; but to inform on friends, colleagues and to criticise one's own industry must entail some emotional toll – especially when the primary motive is to avoid one's own punishment.

As a caveat to these successes, it is important to note that, whilst the US authorities are familiar with the use of wire-tapping and individuals covertly wearing wires, they must still be wary to ensure that they do not entrap innocent individuals into the commission of crime. Entrapment is a substantive defence in the US as, *'Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations'*.[8]

These successful cases no doubt may appear attractive to English prosecutors, but whether suspects in SFO investigations will be as amenable to wearing covert recording devices as individuals have been in the US, and whether our system of justice is so different that the incentive to co-operate – or disincentive to fight a trial – are simply not as strong here may be unanswered questions.

4 *'Chuck Blazer dead: Whistleblower executive whose evidence sparked Fifa corruption scandal dies aged 72'*, The Independent, 13 July 2015.

5 *'Check Blazer: American soccer bigwig turned informant'*, CNN Sport, 5 June 2015.

6 *'Roomy Khan: Here's what it's like to get busted for insider trading'*, Business Insider, 9 June 2016.

7 *'Trader, FBI Informant, Inmate: My Involvement In The Biggest Insider-Trading Investigation in U.S. History, Roomy Khan'*, Forbes, 24 January 2017.

8 Sherman v United States (1957) 356 US 369, 372 as cited in R v Looseley [2001] UKHL 53.

JUSTICE IN ENGLAND AND WALES IS A DIFFERENT BEAST FROM US JUSTICE – THE STICK

The use of covert recording in the US is used within a system which is markedly different from our domestic criminal justice system. It could be argued that the US battle strategy has a trio of components with which the UK simply cannot compete: high sentences, plea bargains and the FBI.

First, maximum sentences for financial crime offences are generally higher in the US than in the UK. The maximum sentence for Bank Fraud in the US is 30 years[9] and the maximum for Securities Fraud is 25 years in prison[10] (hence perhaps the Director's reference to *'spending 20 years in prison*'). The maximum sentences for fraud and bribery in the UK entail a serious loss of liberty counted in years[11], but cases will often conclude with a single digit figure. In addition, an individual in the UK will serve half of any determinate sentence. This is only the tip of the iceberg, however, because, although a defendant in a financial crime case would face a custodial sentence in either jurisdiction, anecdotal evidence indicates a greater fear of US sentencing. The reason for this, in its most simplistic form, may be that the two jurisdictions have different approaches to sentencing which the public, jurors and potential suspects are generally aware of – even if not in any detail. In the US, there is a political capital in tough sentencing and federal judges are nominated by the President and confirmed by the US Senate.[12] The sentencing landscape in the UK is very different as an independent judiciary consider detailed sentencing guidelines, the principle of totality for multiple counts and personal mitigation before exercising judicial discretion.

Press coverage is critical to ensuring that high sentences become a deterrent to dishonest conduct in business. Certainly, one expects senior individuals working in high risk industries to be at least aware of the sentences imposed in high profile cases – in both the US and the UK. Senior managers and C-suite executives are likely to be in receipt of FT and other press alerts covering the outcome of corruption scandals and insider trading rings especially when such information is market sensitive. Therefore the disparity in sentencing in the two jurisdictions will be apparent: where the City of London was shaken when Tom Hayes was sentenced to 14 years (reduced to 11 years on appeal) for his part in the dishonest manipulation of LIBOR[13], New York will remember the 150 year prison sentence imposed on Bernie Madoff in 2009[14] if not Norman Schmidt who was sentenced to 330 years in 2008 for 'high yield' investment fraud.[15]

The threat of high custodial sentences with little chance of parole within the defendant's lifetime is a powerful incentive to engage in the US plea bargaining system.

9 18 U.S.C 1344.

10 18 U.S.C 1348.

11 The maximum sentence for conspiracy to defraud is 10 years' custody. The maximum sentence for Bribery under the Bribery Act 2010 is 10 years' custody.

12 United States Courts, FAQs: Federal Judges.

13 Hayes was convicted of 8 counts of conspiracy to defraud in relation to the manipulation of the Japanese Yen London Interbank Offered Rate (LIBOR). See R v Hayes [2015] EWCA Crim 1944

14 *'Bernard Madoff sentenced to 150 years in prison'*, United States Attorney Southern District of New York, 29 June 2009.

15 *'Norman Schmidt sentenced to 330 years in federal prison for multi-million dollar "High Yield" investment fraud'*, Offices of The United States Attorneys, Colorado, 29 April 2008.

Statistics suggest that in the last 50 years, defendants chose a trial in less than 3% of state and federal criminal cases. The remaining 97% of cases were resolved through plea deals.[16] For a defendant in a financial crime case, the main incentive is a significant reduction in sentence.[17] The UK has no equivalent to plea bargaining and the Courts and the legislature have set their faces against it. When an individual is charged by the SFO in the UK, he may consider that the conviction rates after trial in SFO cases in 2018-2019 was just 53%[18] which may be a disincentive to plead guilty – even factoring in a discount for a guilty plea.

The different approaches of US plea bargains and UK discounts for guilty pleas were stark in the case of R v Whittle.[19] In this case, an English Court was asked to impose a sentence in the UK which was consistent with the sentence imposed by a US Court in line with a plea bargain. Also known as the Marine Hose case, the facts relate to a criminal cartel consisting of the principal manufacturers of marine hose worldwide each of which were party to an agreement or understanding to rig the market for marine hose supply between them. This involved both bid-rigging and price-fixing. Bids were coordinated in a set order that ensured the available business was distributed, based on the agreed market share, and at prices which had been deemed acceptable to the cartel.

In 2007, the US authorities covertly recorded a meeting of members of the cartel at an annual conference in Texas, USA.[20] The individuals incriminated themselves and were arrested in the UK. Included in the list were the three English defendants who worked for Dunlop (Oil and Marine): Peter Whittle, Bryan Allison and David Brammar. These three individuals entered into plea agreements to plead guilty in the US and to a cartel offence in the UK in the event that they were prosecuted here. The plea agreements recommended a term of imprisonment which would be reduced *'by one day for each day of the total term of the sentence of imprisonment imposed upon [him] following his conviction for the UK cartel offence'*. The effect of this was that the individuals could serve the sentences in the UK presuming that those imposed by the English courts were not less than the terms in the plea bargain. The three men returned to the UK and pleaded guilty to an offence under s.188 of the Enterprise Act 2002 and, after appeal, served the equivalent sentences to those reflected in each agreement namely 2.5 years for Whittle, 2 years for Allison and 20 months for Brammar.

Giving the judgment of the court, Hallett LJ made reference to the way in which the plea agreements had affected the instructions which the appellants had given to counsel and how it had affected the presentation of the mitigation by counsel. She said, *'we have our doubts as to the propriety of a US prosecutor seeking to inhibit the way in*

16 *'The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save it'*, National Association of Criminal Defense Lawyers, 10 July 2018.

17 Analysis undertaken by the US Sentencing Commission for Securities and Investment Fraud between 2013 and 2017 asserted that '*Substantial assistance departures were granted in approximately 16 to 28 percent of securities and investment fraud cases in each of the past five years. These offenders received an average reduction of 63.4% in their sentence during the five-year time period.* Quick Facts, Securities and Investment Fraud Offenses, United States Sentencing Commission, 2013 – 2017.

18 Serious Fraud Office, Annual Report and Accounts 2018-2019.

19 R v Peter Whittle, Bryan Allison, David Brammar [2008] EWCA Crim 2560.

20 A notable distinction here is that the covert recordings were obtained through bugging which is distinct from an individual consenting to wear a wire. When a room is bugged, all recorded parties are ignorant to the use of a wire.

which counsel represent their clients in a UK court, but having heard no argument on the subject we shall express no concluded view'.[21] Imposing the sentences which were in line with the US plea agreement, Hallett LJ noted that the Court had *'considerable misgivings about disposing of these applications in the way we intend, but, if we are to avoid injustice, we feel we have no alternative'*.[22]

This case demonstrates that the English Courts will not favour any pressure to be bound by the hands of a US prosecutor. It also shows how much significance the judiciary afford their role as arbiters of justice handing down the right sentence after hearing proper mitigation on both the conduct as well as the offender. A sentence tied up by a self-interested agreement is unlikely to fit easily into this mould.

Given the lengthy deterrent sentences and the established plea bargaining system available in the US, the well-informed suspect approached by the FBI and asked to co-operate may well feel some immediate fear about what may happen to him and instinctively try to limit the damage. This leads to the third point. The US has the FBI – substantially funded, well-resourced and with long arms. The federal budget requested for the FBI in 2019 was $8.92 billion. It is understood that the FBI comprises 12,927 special agents, 3,055 intelligence analysts, and 18,712 professional staff.[23] In contrast, the SFO's core budget for 2018-19 is said to be £52.7m with the potential of access to additional funding when required from the Treasury Reserve.[24] At the end of 2016-17, the SFO had the full time equivalent of around 400 permanent staff.[25] Whilst the UK is geographically 40 times smaller than the United States, the availability of funding and resources in London to investigate the largest global investigations here rather than New York produces a very uneven playing field.

This US triumvirate of high sentences, plea bargains and a well-resourced investigatory agency is the necessary foundation to incentivise a suspect to co-operate, wear a wire and record evidence. Once that evidence is obtained, the US prosecutor will present it to the lawyers acting for the incriminated individuals who will, it is assumed, soon ask to engage in plea negotiations.

That is not to say that an individual in the UK cannot be incentivised. The SFO embraces co-operation, the courts offer discounts for guilty pleas and advice on sentence is accompanied by warnings of draconian confiscation procedures. In a conspiracy, where one individual has co-operated and pleaded guilty, his plea may be admissible evidence against his co-conspirators of the fact of the conspiracy with possible consequences on the prospects of acquittal.

The greatest incentive the SFO can offer to a suspect in exchange for co-operation is immunity from prosecution. If such an agreement is a possible outcome, a suspect will want to understand how he may benefit from it and, conversely, what he will be expected to do for it – on this premise – to conduct surveillance on his former colleagues and friends.

21 §28 R v Whittle.

22 §32 Ibid.

23 https://www.fbi.gov/news/testimony/fbi-budget-request-for-fiscal-year-2019

24 https://www.sfo.gov.uk/2018/04/19/changes-to-sfo-funding-arrangements

25 https://www.sfo.gov.uk/about-us

"When we heard you were playing ball we assumed it was with the company softball team and not with the Feds."

A MARRIAGE OF TRUE MINDS? SOCPA AND THE GRIM RIPA

PART 1 – SOCPA

The incentive to cooperate with the SFO begins with SOCPA agreements. The use of these agreements has evolved from early case-law relating to individuals involved in such offences as murder, drugs and robberies to at least one SFO case.

There are three agreements available to the SFO under sections 71 to 73 of SOCPA under which a co-operating witness can enjoy: (i) immunity from prosecution[26], (ii) a restricted use undertaking – specifying that any information provided will not be used in any criminal proceedings or proceedings under part 5 of POCA (confiscation) or, if the witness is prosecuted, (iii) a written agreement that the Crown Court can take account of any assistance provided by the defendant in sentence.

26 For completeness, there is a statutory exception in s.71(7) of SOCPA prohibiting immunity agreements for cartel offences under s.188 Enterprise Act 2002. In fact, the Enterprise Act predated SOCPA and already contained a statutory provision for an immunity agreement under s.190(4).

Faced therefore with potential imprisonment and a substantial loss of assets, the offer of immunity from the prosecution (and therefore any subsequent confiscation proceedings) may be highly attractive to a suspect. The other agreements should not be dismissed as there may be examples where immunity is not the best option. For example, where there are ongoing proceedings in other jurisdictions, the suspect may seek to plead guilty in exchange for a reduction in sentence as the best protection from a criminal trial overseas – relying on the principle of double jeopardy.

There is not yet any published SFO policy prescribing when it may offer an immunity agreement but the challenge to both parties is likely to centre on the high threshold of the public interest test and the case-law demonstrating that immunity should only be offered in exceptional cases

The high threshold test for full immunity can be found in the three-part criteria set out by the then-Attorney General, Sir Michael Havers QC, in a written answer to House of Commons on 9 November 1981.[27]

i. *'whether, in the interests of justice, it is of more value to have a suspected person as a witness for the crown rather than as a possible defendant?*

ii. *whether, in the interests of public safety and security, the obtaining of information about the extent and nature of criminal activities is of greater importance than the possible conviction of an individual?*

iii. *whether it is very unlikely that any information could be obtained without an offer of immunity and whether it is also very unlikely that any prosecution could be launched against the person to whom the immunity is offered?'*

The SFO might want to argue that the public interest is best served by using a co-operating witness to collect crucial evidence which is unlikely to exist elsewhere. However, it will be a challenge if, as in many financial crime cases, there is already significant contemporaneous documentary evidence. Such material will tend to reduce the necessity and significance of any covert recording evidence which might be obtained and heighten the risks involved in calling such a witness for the Crown. In addition, it may present a difficulty in satisfying the third limb of the test.

Alternatively, the SFO may choose the seemingly easier path and argue that a case involves such complexity and such a volume of paper-based evidence that a jury will not follow without someone to 'bring it to life'? Whether the SFO is seeking more and better evidence or merely presentational advantage, such an argument does not seem to meet the high threshold test for immunity to be offered. Returning to first principles, the general rule for prosecutors is that, where sufficient evidence exists to provide a realistic prospect of conviction, the public interest requires that an accomplice should be prosecuted, regardless of whether or not he is going to be called as a witness. An appellate view might suggest that the jury can as well hear from the accomplice where he has pleaded guilty and co-operated or when the prosecution adduces a case against him as a defendant.

27 Hansard Parliamentary Archives, 9 November 1981, Written Answers (Commons), Attorney General, Vol 12, cc12-3W.

There may also be some difficulty in navigating the second limb of the test. Undoubtedly fact-specific, the response may call on the integrity of the markets and financial security as arguments in favour of public protection. Such an argument may follow a similar line of rationale as the RIPA ground that authorisation is necessary for the purpose of preventing or detecting crime or is the interests of the economic wellbeing of the UK.

The courts have shared Parliament's view that the offer of immunity to a person who has committed a serious offence is a high price to pay for his evidence at trial. The key case of R v Blackburn[28] centered on the defendant's role as a getaway driver to an execution. Blackburn was arrested and ultimately pleaded guilty as part of a SOCPA agreement to co-operate in exchange for a lenient sentence. He provided a full witness statement including information about the murder and those responsible. He provided evidence at the trial of one of those men – which was considered critical in securing the conviction (the court noted that the case would have been discontinued without Blackburn's evidence) and enabled the prosecution to obtain a European Arrest Warrant in respect of the second man. In that case, the Court of Appeal commented, *'We cannot envisage any circumstances in which a defendant who has committed and for these purposes admitted serious crimes can or should escape punishment altogether'.*[29]

This high threshold test should not be seen as a hurdle by prosecutors or suspects seeking to enter into SOCPA agreements; rather it is a safeguard, which should be respected as one of the protections of English justice.

The detail of any agreement, once reached, is also significant as it is effectively the contract between the now-witness and the state. The witness's lawyers will be wary to ensure that any condition of the agreement where the witness is commissioned to create a covert recording is realistic and achievable. This leads to a second safeguard – the public interest test under RIPA.

PART 2 – RIPA

The powers contained within RIPA allow the state to infringe rights to privacy and personal relationships. Listening and watching are invasive but RIPA also allows for the authorisation of individuals to act as CHIS to exploit relationships to obtain information. Under RIPA, such information is admissible as evidence subject to the specified protections.

Under section 26(8) of RIPA: a person is *'a covert human intelligence source if*:

a. he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);

b. he covertly uses such a relationship to obtain information or to provide access to any information to another person; or

c. he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.'[30]

28 R v Blackburn [2007] EWCA Crim 2290.

29 §41 *Ibid.*

30 S.26 RIPA 2000 & Covert Human Intelligence Sources, Revised Code of Practice, Home Office, August 2018.

A CHIS can be an employee of the state such as a police officer or he can be a lay person but CHIS authorisation is only required when the person is establishing, maintaining or using a relationship to obtain intelligence.[31] A co-operating witness returning to the scene will already have established relationships with colleagues and the use of those relationships to obtain information would arguably fall under these RIPA provisions. The Home Office Code of Practice notes that the use of a CHIS can be, *'a particularly intrusive and high risk covert technique, requiring dedicated and sufficient resources, oversight and management. Authorisation is therefore advisable where a public authority intends to task someone to act as a CHIS, or where it is believed an individual is acting in that capacity and it is intended to obtain information from them accordingly'*.[32]

In order for the SFO to grant authorisation, it must believe that:

a. the use of the CHIS is necessary on certain designated grounds (grounds include the purpose of preventing or detecting crime or in the interests of the economic wellbeing of the UK);
b. it is proportionate to the intelligence dividend that it seeks to achieve; and
c. it is in compliance with the relevant articles of the European Convention on Human Rights (ECHR), especially articles 6 and 8.[33]

31 The SFO has the authority to grant authorisation for the use of a CHIS. Sections 27 and 28 and Part 1 of Schedule 1, RIPA 2000.

32 2.12 Covert Human Intelligence Sources, Revised Code of Practice, Home Office, August 2018.

33 Extracted from section 28 and 29, RIPA 2000 and the Revised Code of Practice, Home Office, August 2018. Additional requirements are imposed that the source is independently managed and supervised, that records are kept of the use made of the source and that the source's identity is protected from those who do not need to know it. See RIPA explanatory notes §194-196 for detail.

The co-operating witness, acting as a CHIS will be aiming to record evidence of the offence of which he is a suspect or to obtain confession evidence. Both scenarios pose a difficulty for the SFO as the test for authorisation requires that the SFO believes the surveillance to be necessary to prevent or detect a crime. How so? By the time the co-operating witness has become a CHIS, he will already have given a full account of his own knowledge of the crime and involvement. Arguably, his account will have provided the SFO with an evidential case. Is further surveillance necessary to prevent the crime when the SFO can make arrests and stop the criminality? Separately, is it proportionate, considering the other evidence which may be available to the SFO through the use of extensive investigatory powers of production, search and seizure and interview?

WALKING THE WIRE – THE HIGH RISK OF DAMAGING AN OTHERWISE ARGUABLE PROSECUTION CASE

The decision to rely on a co-operating witness to make covert recordings is a finely balanced one for prosecutors. On the one hand, the ultimate reward for the SFO may be a RIPA-compliant recording of ongoing criminality. There is also the prosecutor's perhaps well-founded belief that the jury will be spellbound by hearing what actually happened from the mouth of one who was there when the recording is played. Insider dealing and tax evasion are both examples of offences notoriously difficult to prosecute as the evidence of the act and the underlying intention of individuals are unlikely to be found in documentary evidence. Any recording capturing such criminality is likely to be valuable.

On the other hand, the use of a witness covertly to record other suspects is a high-risk strategy. If the consequences go wrong, the case may be seriously undermined. Firstly, there may be real difficulties with the admissibility of any recording. When the witness engages a suspect in conversation, there are risks that the suspect is being entrapped into the commission of an offence or engaged in such a way that he may make an unreliable confession. If the recordings were to be excluded, would the case survive and continue? Separately, has the prosecution case been weakened through the creation of material which, once disclosed, leads to a trial of the propriety of the prosecution's investigatory methods as opposed to the alleged offence? It may be that capable prosecution counsel can overcome such a defence strategy but it is, as yet, untested before a jury in England and Wales. Ultimately, it is a difficult judgment as to how the credibility of evidence of someone who has secured immunity by recording incriminating evidence against others will be assessed when he accepts his own guilty conduct.

ADMISSIBILITY OF A COVERT RECORDING

Consider an analogy with an undercover police officer infiltrating a drugs cartel. The officer (wearing a covert recording device) is able to establish and maintain relationships with suspected drug dealers. He witnesses their behaviour and may offer the opportunity to commit a crime (making a test purchase). Once intelligence has been obtained and reviewed, suspects may be charged and the evidence of the undercover test-purchase officer will be admissible in evidence.

Importantly, in these circumstances, there are strict limits on what the police officer is and is not allowed to do. He is not entitled to step beyond a passive investigation of the suspect's criminal activity in order to '*exercise an influence such as to incite the commission of an offence*'.[34] As the House of Lords has previously held: *'It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power and an abuse of the process of the courts*'.[35] If a co-operating witness is authorised to return to the scene of the crime, undercover, to record evidence of ongoing criminality there is a real risk that he may overstep what is permissible in law and entrap individuals into the commission of offences. The issue might then be whether any remedy might ensure that a trial on the basis of such evidence could be fair.

A further limitation is that, although the undercover officer is allowed to ask questions of the suspect to obtain an intelligence picture he is not allowed to enter the scene in order to interrogate the suspect about his past or current offending for the purposes of gathering evidence. Where the officer wants to interrogate, he must act in accordance with the procedural safeguards contained in the Police and Criminal Evidence Act 1984 ("PACE"). If the co-operating witness were to be authorised to act as a CHIS in order to elicit the confessions of his peers, the SFO should be prepared to be challenged robustly on admissibility on the basis that the witness is being used by the SFO to circumvent proper interrogation

34 Teixeira de Castro v Portugal, 28 E.H.R.R. 101, ECtHR.

35 R v Looseley [2001] UKHL 53 (§1).

"Should I just hit 'reply to all' and save the government the trouble?"

practices under PACE. The confession will have been obtained, arguably, by a state actor undertaking a covert interrogation. The admissibility objections to an account obtained from a suspect who is not under caution, and who does not even know that the interrogator acts for the authorities, may appear very persuasive to the courts.

Loose language used in the workplace and social environments increase the risk of an unreliable confession. This may be especially so in certain financial markets or the trading floor. From LIBOR to EURIBOR, the courts have seen examples of crudely worded boasting and exaggeration. On the 'fake it until you make it' ladder to the executive level, there will doubtless be claims of having had 'a hot tip', 'classified information' and so on as suspects seek to demonstrate their ability and success to colleagues and competitors. It may not take a great deal for the witness to stoke such a conversation in a suspected insider-dealing case or rate-rigging case but his recording may not contain any evidence of real crime – just corporate gloss. Of course, even where a confession might be truthful, it may still be subject to an admissibility challenge. If the suspect confesses as a result of things said or done which undermine the reliability of the confession, will there be arguments under PACE to exclude the confession?

What happens if the confession is excluded? Is there still a case which could be rescued? Inadmissible recordings

of criminal conduct or confessions have a habit of contaminating other evidence in ways which cannot always be predicted. As a matter of law, an inadmissible confession repeated in a PACE interview would be fruits from the poisoned tree. Similarly, as the evidence of the inadmissible confession is put to other suspects in interview, there may be arguments that the answers given in response should be excluded under PACE.

INVESTIGATORY METHODS ON TRIAL

Where the recordings made by a cooperating witness are admissible and played in court, the jury will most likely be made aware of the source and methods used to obtain them. Arguments may be made to attack the value or veracity of those recordings by defence teams and, even if not successful, such arguments may distract from the issues.

Disclosure will reveal details of the SOCPA debriefing process which is lengthy and carries a risk that evidence is wittingly or unwittingly tainted. In addition, debriefing requires that the witness waive legal professional privilege ("LPP"). The catalogue of discussions between the SFO and the witness will range from setting the parameters of what he is expected to do and what he cannot do under the conditions of RIPA authorisation through to planning whom he will attempt to speak with whilst undercover, when and where. The fairness of the scope, methodology and their application will all be in issue.

The quality of the recording, the result of expert digital enhancements, any ambiguity in the selection of recordings produced, the extent of any alleged but unrecorded communication with the co-operating witness because he is not wearing a device at all times are only some of the potential issues which may arise.

In practice, the ultimate gift to the defence may be disclosure of a series of recordings in which there is nothing of any investigatory or evidential value. In such circumstances the jury will be asked to interpret the recordings as a demonstration of the lack of evidence of any ongoing criminality or admissions.

THE CREDIBILITY OF THE COOPERATING WITNESS AT TRIAL

It goes without saying that our courts are familiar with testimony from co-operating witnesses who have chosen to give Queen's Evidence. Whilst juries may certainly find a compelling account to be persuasive, experience suggests that they are frequently ambivalent about the value of evidence from a 'guilty witness'. The challenge for the witness is to give evidence about his own wrong-doing and his 'deal' with the authorities to incriminate others whilst maintaining credibility in the eyes of the jury.

To meet the first part of this challenge, the witness will have been required to give a full, no-holds-barred account of all his past criminal conduct during a 'cleansing process'. The origins of this process stem from the cases in which a hitherto career criminal was metamorphosed into a credible and reliable prosecution witness – one who would withstand cross-examination. In a financial crime context, the cleansing may embrace the witness's involvement in the

suspected offence in addition to industry misconduct and regulatory breaches. An interesting question is whether it may extend further into the murky waters of unattractive but legitimate business practices? The SFO may have to take an uncharacteristically commercial approach to assertions that certain conduct was standard market practice.

It is expected that SFO cases will be relying on traders or dealers or bankers or insurers – professional people who will be prima facie reliable. However, there are the obvious risks that some witnesses, no-matter how reliable their conduct has been in professional life, will be tempted to embroider their accounts or seek to minimise their own guilt. An impetuous or arrogant financier deemed to be dramatising the alleged wrongdoing on the same trading floor where he himself has worked may encounter a frosty reception from a jury. The witness's own trading history, ulterior motives and past discrepancies may further the jury's distrust of his account.

Conversely, the evidence of a witness who seeks to justify his behaviour may also be susceptible to challenge. In R v Dahdelah (Southwark Crown Court 2014), the key witness had pleaded guilty to conspiracy to corrupt. A process had been undertaken to ensure that he had made full and extensive admissions and it was doubtless expected that his accepted conduct would be the focus of defence challenges to his credibility. On the contrary, however, the key and most effective line of cross-examination related to a part of his account where he had asserted that he did not consider the payment to be 'improper' or a 'bribe'. The issue was whether there was any bribery by reason of principal's consent. The cross-examination was an illustrated assertion that he was not lying and not guilty on his own account, and that, by extension, the defendant on trial was not guilty. The witness's realisation that he may have had a defence and his blossoming chagrin over an arguably pragmatic guilty plea played out before the jury. This was among the factors which contributed towards bringing the prosecution of the remaining defendant to a close.

The SFO may speculate that in such a case if the witness had co-operated further and agreed to wear a wire, this situation might have been avoided. However, a witness who has repeatedly underplayed his own conduct would scarcely be in a position to seek full admissions from others.

Prosecution counsel may sometimes have a tendency to want to pick the plums from the duff. Where the credibility of a witness is very much in issue, counsel has the benefit of his independence from the personality of the witness himself when emphasising what may be significant evidence. Where a co-operating witness has been instructed to wear a wire to further the prosecution case, he has been empowered to perform a function for the state. As such, it is much more difficult for the prosecution to distance itself from its own actor.

IS THIS THE THIN END OF A VERY UNATTRACTIVE WEDGE?

The final question is what would a new world of wires and surveillance and co-operating witnesses look like? What unintended consequences may there be? How far might the SFO be tempted to go?

Might the SFO consider using a co-operating witness who

is a family member? Perhaps a spouse facing a money laundering conspiracy – might he or she be encouraged to sign an immunity agreement in exchange for covertly recording his or her partner?

In the legal services market, will there be a like-for-like adaptation of the SFO's powers? The practice of internal investigations is increasingly to use similar methods to the prosecutorial authorities. What if corporates introduce surveillance? It may seem fanciful in the face of strict restrictions against unlawful inception under RIPA, but might a worried employer seek to incorporate consent to being recorded into an employment contract?

This unattractive possibility overlaps with the potential risk that the use of a co-operating witness to establish evidence of the facts agreed between the corporate and the SFO might arise in some future DPA discussions. Might co-operation credit be properly extended to include use of covert evidence as the corporate equivalent to a SOCPA agreement?

WAS THE DIRECTOR EVINCING A TRUE INTENT OR WAS IT JUST A THROWAWAY REMARK?

The ambition to introduce new and more transatlantic methods of investigation to Serious Fraud Office cases is not to be discouraged without cause. In fact, the duty of a prosecuting authority is to evaluate new and appropriate powers in the fight against crime. Likewise, the concerns of defence lawyers should not be brushed over as reactionary or unfounded. Experience provides the foundation of concerns about the use of a co-operating witness.

There will and should always be a public and personal cost to an individual who has committed a crime. In the event that he provides assistance to the prosecution in order to obtain a better outcome for himself, there will inevitably be concern about the fairness of the process for the trial of any co-defendants.

For the State to advantage an admitted criminal for the purpose of endeavouring to prove allegations against others on trial has attributes of lack of fairness and transparency as well as offending a sense of natural justice. The contrast has to be between the role of the well-trained undercover police officer in seeking to detect and prevent crime (that is his job and his duty is to be impartial) with that of the co-operating witness - recording his former colleagues in order to meet a condition of an agreement which will result in his release from or reduction of accountability for serious wrongdoing.

Will it ever happen? The Director said in a very recent speech, law enforcement is only involved when something has gone very badly wrong, at that point, *'it is our duty to use the intrusive powers that Parliament has given us to find the evidence*'.[36] Could she have been referring to RIPA?

36 Speech of Lisa Osofsky to the Cambridge Symposium, 2 September 2019, as published on the SFO website.

Welcome to chambers

This newsletter gives us the opportunity to welcome Rachel, Aaron and Kathryn into chambers.

Rachel Kapila

Aaron Watkins

Kathryn Arnot Drummond

Nicholas Purnell QC
John Kelsey-Fry QC
Ian Winter QC
Alison Pople QC
Tom Allen QC
Clare Sibson QC
Jonathan Barnard
Rachel Kapila
Aaron Watkins
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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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