Neutral Citation Number: [2010] EWCA Crim 1048

Case No: 2010/02063/A3

COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
Mr Justice Bean

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE DAVID CLARKE
and
MR JUSTICE LLOYD JONES

- -

Between :

R
- v -
Dougall

- -
- -

Mr Ian Winter QC (instructed by BCL Copeland) for the Appellant
Mr John Kelsey-Fry QC for the Director of the Serious Fraud Office

Hearing dates : 29th April 2010

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Judgment

The Lord Chief Justice of England and Wales:

1. This is the judgment of the court in an appeal by Robert Dougall against a sentence of 12 months imprisonment imposed on him by Bean J at Southwark Crown Court on 14 April this year following his plea of guilty to conspiracy to corrupt. The particulars of offence alleged that between February 2002 and January 2006, virtually 4 years, he conspired with a company known as Depuy International Limited and others to make corrupt payments and/or give other inducements to agents of the Hellenic Republic, namely medical professionals working within the public healthcare system in the Hellenic Republic, in relation to the award of contracts for the supply of orthopaedic products in favour of Depuy International Limited.

2. The sentencing hearing raised a number of difficult issues. After he had passed sentence the judge certified that the case was fit for appeal on the basis that it raised "a novel point on the proper approach to sentence in cases involving an agreement with the cooperating defendant under section 73 of SOCPA 2005", that is, the Serious Organised Crime and Police Act.

3. The burden of the submission by Mr. Ian Winter QC on behalf of the appellant is that the decision of the judge that the sentence should not be suspended was wrong in principle and resulted in an excessive sentence. In the circumstances of this case the only sentence commensurate with the seriousness of the offence, and the available mitigation, was a suspended sentence. Mr. John Kelsey-Fry QC on behalf of the Director of the Serious Fraud Office (the SFO) highlighted the Director's agreement with the factual matters advanced by Mr. Winter in support of his submission.

4. We shall outline the essential facts before turning to the circumstances in which the appellant entered into a plea agreement with the prosecution under section 73 of the Serious Organised Crime and Police Act 2005, and in due course pleaded guilty at the Crown Court on the basis that he was an assisting or cooperating defendant.

5. It is perhaps worth emphasizing the seriousness of the offence, and illustrating it by recording what Kofi Annan, the Secretary General to the United Nations, observed in his foreword to the 2004 UN Convention Against Corruption. He said:

> "Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries – big and small, rich and poor…corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic under-performance and a major obstacle to poverty alleviation and development."

6. The principal domestic legislation dealing with corruption is to be found in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906,

supplemented by the Prevention of Corruption Act 1916 and the Anti-terrorism, Crime and Security Act 2001, Part 12. The United Kingdom is a party to the OECD Convention on Combating Bribery of Foreign Public Officials 1997, Article 3.1 which requires the signatories to apply criminal penalties which are "effective, proportionate and dissuasive". It is neither a defence nor mitigation for a businessman in this country who has involved himself in corruption abroad to demonstrate that he is merely following local practices in that foreign country, or that others doing business there use the same murky practices.

7. It is a feature of this case that the maximum available custodial sentence is 7 years' imprisonment. When one notes that this appellant was not one of the prime movers in the hierarchy of corruption which we shall now outline, the maximum custodial sentence is disproportionately moderate. The position in relation to financial penalties is different and was considered by Thomas LJ in *R v Innospec Limited,* to which we refer at paragraph 24.

Facts

8. This is a case which involves substantial international corruption. The appellant worked for a company known as Depuy International Limited (DPI), a company based in Leeds which manufactured orthopaedic devices such as prosthetic hips, knees, limbs and so on. At the material time it had something like 950 employees and the turnover of the company in the financial year 2008/9 was £158 million.

9. DPI has, since 1990, been a wholly owned subsidiary of an American Company, Depuy Incorporated. Since 1998 both the American Company and the Leeds based Company were owned by the Johnson and Johnson Group of Companies, one of the world's largest manufacturers and distributors of healthcare products.

10. One of the countries to which its products were sold was Greece. There was, on any view, a highly competitive market. Healthcare in Greece is provided through a mixture of public and private services, clinics and combinations financed through a combination of compulsory public contributions, government subsidies and private insurance. Something like 70% of the medical supplies in Greece are purchased through the public sector. The majority of doctors and surgeons are directly employed by the Government. Specialist orthopaedic equipment can differ hugely. Surgeons in Greece and others involved in the health services enjoyed huge influence about which prosthetic devices should be ordered by their hospital or their clinic.

11. Examination of the market in the period leading up to and following 2002 demonstrates that in Greece the prices of orthopaedic products have been significantly inflated at any rate when compared with the rest of Europe. Thus, for example, in Greece the price of a prosthetic knee was £4,400 when the European average was exactly half (£2,200), and on occasions lower still at £1,100. One reason why prices were so high in Greece was that the market was corrupt. Those responsible for procurement of medical supplies were provided with cash or other incentives to award the relevant contract to a particular supplier. The practice was endemic, DPI was not the only company involved in this corruption.

12. To understand something of the scale, during a period of just under 4 years sales by DPI to Greece were substantial, falling just short of £20 million or €29 million.

Something like £4.5 million of corrupt payments were made to health officials, doctors and surgeons. The object was to retain DPI's market position in Greece, and this was the way it was to be done. In the meantime, of course, the additions to the bill fell on to the shoulders of the tax-payer in Greece.

13. Paragraphs 21-33 of the plea agreement itself set out further details and we shall repeat them.

> "21. The practice of Depuy International Limited ("DPI") making funds available for the payment of inducements or rewards to surgeons in the Greek orthopaedic market dates back to at least 1997 if not earlier. At that time, DPI sold products in the Greek public health system through a distribution contract with Medec SA ("Medec"), a Greek company owned and managed by Nikolaos Karagiannis ("Karagiannis"). Separately, DPI paid a 35% "commission" (in advance, on all Medec sales) to an Isle of Man registered company called Madison Management Limited ("Madison"), also owned by Karagiannis. In truth, this payment of 35% was understood by those to enable Karagiannis (after expenses and other costs) to pay corrupt cash incentives or similar inducements/rewards for surgeons in the Greek market to use DPI's products. This all pre-dated Dougall's responsibility.
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> 22. Dougall says that the corrupt practice of paying inducements or rewards to orthopaedic surgeons in the Greek public health system was endemic. Certainly, the practice appeared to have been prevalent. The payments were routinely characterised as 'cash incentives', or so-called 'Professional Education, alternatively '"Prof Ed"'. The level of funds made available for "Prof Ed" purposes was a standard 20% of the value of end-user sale prices. The prices of orthopaedic products were fixed according to a national list price agreed with the Greek government. The prices of such products appear to have been inflated in Greece relative to the rest of Europe (around twice the European average and sometimes four fold). The Greek government would periodically seek to impose a price reduction with a view to reducing/eliminating "Prof Ed" practices. However, such price reductions were either not implemented or were not implemented effectively.
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> 23. In May 1999, following the acquisition of DPI's parent company, De Puy Incorporated ("Depuy"), by Johnson & Johnson ("J&J"), the offshore payments to Madison were terminated as being in contravention of J&J's Policy on Business Conduct and its "Credo". Around the same time, individuals at J&J argued for the

termination of DPI's distribution contract with Medec and for the integration of DPI's Greek business with J&J's local subsidiary, J&J Hellas ("JJH"). In early 2000, Dougall and Gary Fitzpatrick ("Fitzpatrick"), the Vice President of Finance for DPI, were asked by Mike Dormer ("Dormer"), the Depuy Company Group Chairman, to make a decision as to how DPI continued operations in Greece should be managed. Dougall had been promoted to Director of Marketing for DPI in 1999. In addition, from 2000, he was given operational responsibility for DPI's European markets (including Greece but with the exception of the UK, Italy, France and Germany).

24. The decision made by Dougall and Fitzpatrick was that the distribution agreement between DPI and Medec should be terminated and DPI's Greek business transferred to JJH. Dougall could see no obvious commercial reason why DPI should be involved in a business in Greece (as opposed to transferring the business to JJH). Dougall, Fitzpatrick and Greg Franks, DPI President, informed Dormer of this decision in January 2000, a decision with which Dormer initially agreed. However, following a meeting with Despina Filippou ("Filippou"), at that time Karagiannis' personal assistant, Dormer unilaterally reversed the decision and directed that a business model continuing DPI's relationship with Medec should be found.

25. Dougall became aware of the practice of paying "Prof Ed" around this time in early 2000. He recognised that such payments were inappropriate and he was perturbed at the prospect of giving 20% to an intermediary for such purposes because of the inherent business risks involved. However, no one within the Depuy/DPI or J&J organisations suggested any business model which did not incorporate provision for 20% "Prof Ed". Dormer and others within J&J were involved in the decision making throughout 2000 and beyond and were aware of the need to make the 20% available. To one degree or another, a number of people more senior and experienced than Dougall had knowledge of what went on in Greece and they all treated the situation with apparent insouciance. Dougall was new to the board and did not object to the payment of "Prof Ed" as he explained in interview, "it was accepted by everybody as the cost of doing business in Greece and he was not going to be the uncool one". He understood that a relevant factor in Dormer's decision was the perception that the practice of paying "Prof Ed" in the Greek

market would not continue indefinitely as the Greek government would take steps to eradicate the practice.

26. In late 2000, the decision was made that DPI would acquire Medec, sell directly to end-users, and independently provide Karagiannis, as a consultant, with funds equivalent to 20% of the value of sales to be used for "Prof Ed" purposes. The advantage of this model was that it gave DPI access to end user revenues as opposed to discounted revenues received from sales to third party dealers/distributors. Individuals at J&J, however, such as Hak and Bruce van der Merwe ("van der Merwe"), International Vice President of J&J EMEA, objected to the DPI model. Whilst they never objected to the principle of making 20% available to an intermediary for "Prof ED" purposes, the J&J preferred "arms-length" model involved selling products to independent dealers at a discount sufficient to incorporate provision for 20% "Prof Ed". The dealers would sell the products to end-users and make whatever "Prof Ed" payments were necessary.

27. In February 2001, DPI acquired Medec, which was later renamed Depuy Medec SA ("DPM"). Around the same time, Medec entered into a three-year (ending December 2003) consultancy agreement with Karagiannis through his new company, Med-K. It was intended that following this three-year period, DPM would be in a position to integrate its operations with JJH. Pursuant to the consultancy agreement, Med-K was paid 27% of the value of Medec's/DPM's sales. The idea was that, following the imposition of local taxes, the amount available to Karagiannis for "Prof Ed" purposes would net down to 20%. Karagiannis would be remunerated separately by a combination of the deferred goodwill payments on the acquisition of Medec and annual bonus payments of 10% based on the achievement of sales targets by Medec/DPM.

28. In practice, although Dougall was aware of the purpose of the "Prof Ed" payments, Dougall did not know exactly what Karagiannis did with the money that was made available to him or exactly how much was in fact used for "Prof Ed". Dougall stated in interview that one of the "distasteful" things about a company getting involved in a situation where funds are made available to an intermediary, without requiring any accounting for those funds, is that the company opens itself up to exploitation and extortion by the intermediary. Although the money paid to Karagiannis was allocated

to cover so-called "Prof Ed" expenses, it was contemplated by Dougall that Karagiannis may well have retained some of the funds for himself and was likely to have spent a large proportion of the funds on inducements/rewards other than direct cash incentives, for example, surgeons' office equipment, and industry-wide 'vanity meetings' for surgeons.

29. Although the "Prof Ed" practices facilitated by DPI were unquestionably unlawful following the coming into force of the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act") on 14th February 2002, they continued without significant change. Indeed, from 2002, the payment to Med-K was increased to 31% (23% after tax) as a result of Karagiannis' claim that he needed greater funds in order to compete with others in the market, including JJH, whose dealers operated at "Prof Ed" levels as high as 30%. In October 2003, however, due to a breakdown in the relationship with Karagiannis, the consultancy agreement with Med-K was terminated. At the same time, DPM was renamed Depuy Hellas SA ("DPH) and a further consultancy agreement, on identical terms to that which had applied previously, was entered into with Karagiannis (estranged) brother, Christos Karagiannis, on the understanding that Christos Karagiannis would continue to make the necessary "Prof Ed" payments.

30. In November 2004, Dougall was (for unrelated reasons) made redundant from DPI. However, after a period of weeks he was asked to return to the company by the DPI President at the time, Mike Thompson. In Dougall's absence, operational responsibility for Greece had been transferred such that, when he returned to the company, although Dougall retained a significant role, he no longer had executive responsibility for DPI's Greek operations. However, he continued because of his experience in the market to be involved in the decision making process.

31. During Dougall's absence at the end of 2004 Thompson had decided that he wanted DPI to have nothing further to do with the Greek market following a meeting that he had held with Filippou. When Dougall returned and out of loyalty to Filippou he tried to devise a business model that would enable DPI to continue in the Greek market but using a distributor network. Dougall proposed this model to Dormer who insisted that he did not want to use a distributor, a consultant or any intermediary at all. Dougall explained that this would result in the loss of

95% of DPI's Greek market. Dormer was happy with such a scenario as a result of which Dougall subsequently indicated in emails that "the time is right to make things clean and clear in Greece".

32. In 2004 EUCOMED had already sought to implement an industry code of business conduct targeted at all suppliers of medical technology and services in Europe. This formed part of a more general industry-wide drive towards greater compliance with ethical business standards. On 12 May 2005, a EUCOMED meeting took place, which was attended by representatives of the major orthopaedic suppliers in Greece. Dougall attended the meeting on behalf of DPI. According to Dougall in interview, the conversation was somewhat guarded until Dougall stood up and raised the issue that all the companies were making money available to intermediaries to spend in ways which were not compliant, including "cash", and that this practice should stop. Around the same time, in discussions relating to the integration of DPH with JJH, Dougall sought to implement Dormer's decision to cease to use intermediaries so as to eliminate all "Prof Ed" payments and selling direct to end users.

33. There is no evidence that Dougall solicited or received direct cash benefits (or equivalent direct benefits or any other personal benefits) from the corrupt arrangements adopted in Greece. The benefits were corporate."

14. The aggravating features of this case are clear. The system of corruption was endemic, and it was persistent. The appellant was involved for just under 4 years. The total sums involved in the corrupt activity were very substantial. It was funded by public money raised by taxation in Greece. The misconduct was prohibited by the declared policies of J & J. This was not a case which involved the corruption of foreign government ministers, but the corruption was carried out systematically, deliberately and intentionally by those seeking to make profits through business in Greece, including much higher levels in DPI than the appellant's position, and emulated by DPI's competitors from other countries.

15. The features of the offence which mitigate the appellant's culpability are powerful. They are:

(a) A system of second country payments had been operated to make corrupt payments in Greece before the appellant had any responsibility for business with that country. In short the appellant came to the system of corruption and corrupt payments: he was not responsible for the initiation of any such practices, and the corrupt activities of DPI pre-dated his involvement.

(b) The appellant was promoted to the position of Marketing Director of DPI in October 1999 and was given additional operational responsibility for DPI's business

in Greece from 2000. In November 2004 he was made redundant, but shortly thereafter he returned to the company. He no longer had executive responsibility for Greece but he was asked to retain some involvement in DPI's Greek operations. His employment was terminated by agreement in April 2007. Dougall was never a statutory director.

(c) The corrupt practices involved the knowledge, consent and participation of individuals in positions of responsibility considerably senior to the appellant within the DPI, Depuy and J & J company hierarchies. Although the appellant had responsibility for trading in Greece he was at a middle management level and there were others much more senior than he, who were involved in and promoted the corrupt practices. The prosecution opening below put it as follows:

> "It is apparent from the papers that when Mr. Dougall says that those much more experienced and much senior to him in the hierarchy were not only cognisant of these matters but positively consenting, it is undoubtedly true."

(d) The appellant explained in interview that he first became aware for the need for "Prof Ed" in the Greek market in early 2000 in the context of his consideration of the future business model. He considered that payments to be inappropriate and felt very unhappy about them. He was perturbed at the prospect of giving 20% to an intermediary for Prof Ed purposes. However, he did not feel he had any choice. He became aware that funds had previously been made available by other routes for corrupt payments. Nobody suggested any business model which did not incorporate provision for 20% Prof Ed. A number of people more senior and experienced than the appellant had knowledge of what went on in Greece. They treated the situation with insouciance. The appellant was new to the board, had no direct experience of operational management in Greece or any other market and did not feel able to object to the accepted practice of paying bribes.

(e) The appellant maintained at an early stage of his involvement that DPI's operations in Greece should be managed by terminating the agreement with Medec and handing DPI's Greek business over to JJH., the Greek subsidiary of J & J. At a meeting on the 20th January 2000 the appellant and others recommended that the agreement with Medec be terminated and the business transferred to JJH. This was initially accepted but later the same day the decision was unilaterally reversed by a more senior executive who decided that the relationship with Medec would continue. This decision was taken to maintain the market share enjoyed in Greece. The appellant and others were instructed to identify a business model to enable this to continue.

(f) The appellant and another, acting on the instructions of a more senior executive, continued to permit and actively sustained the arrangements which had been put in place in 2001 when Medec had been acquired by DPI.

(g) After his return in November 2004 the appellant no longer had operational responsibility for Greece and was therefore not in an executive position to influence whether the conduct in Greece should continue. However because of his experience in the market he did retain some involvement.

(h) In the summer of 2005 the appellant took a lead role in seeking to persuade members of EUCOMED, a pan-European association representing designers, manufacturers and suppliers of medical technology, to cease corrupt practices in Greece. At a meeting of EUCOMED on 19th April 2005 the appellant was urging his colleagues that "the time is right to make things clean and clear in Greece". He advocated to the other companies the model of using no intermediaries in Greece and thereby eliminating the practice of paying bribes. He proposed a move to full compliance by 1st June 2006. However the body of opinion was against him and he agreed to accept a majority verdict that October should be the cut off date.

(i) The DPI business was ultimately transferred to JJH from the beginning of 2006. Accordingly, the mechanism of using a consultant to make funds available for corrupt payments appears to have ceased on the 1st January 2006. However the appellant had no control over whether the business of DPI and J & J in Greece was compliant thereafter.

(j) The benefits of the corrupt system were entirely corporate. There was no evidence that any of the managers or directors of DPI solicited or received direct cash benefits from the corrupt arrangements. The appellant's salary was as follows: 2002 - £86,000; 2003 - £90,000; 2004 - £92,000; 2005 - £95,000. The appellant received very small bonuses and stock value options totalling less than £20,000. His remuneration may be considered moderate by the standards of senior executives in these companies. His corrupt conduct resulted in no personal benefit to the appellant. There were no bonuses arising from the Greek business.

(k) There is no evidence to suggest that the appellant won high value contracts against honest opposition by the use of corrupt bargains: indeed this is true of J&J and DPI. Although the appellant considered the 20% "Prof Ed" monies to be neither morally nor commercially acceptable, he was required to play his part by his superiors. There is therefore, no question of any breach of trust.

(l) The appellant is the only individual worldwide to have accepted personal criminal responsibility for the corrupt conduct engaged in by J&J and DPI. He has made unambiguous admissions of his corrupt activities, has cooperated fully with the investigations from a very early stage and has provided substantial assistance to the authorities. He has entered into an assisting offender agreement under section 73 of SOCPA which imposes onerous conditions on him, including an obligation to co-operate both with the United Kingdom and the United States of America corruption investigations which are expected to last for a long time, and which will make him effectively unemployable until the conclusion of the investigation.

(m) It is acknowledged that his co-operation with the prosecuting authorities both in the United Kingdom and the United States has been fulsome. The value of him reaching the plea agreement at the earliest reasonable opportunity and in the assistance he has already provided for the prosecution and possible prosecution of others, both corporate and individual is substantial.

(n) The appellant is 44 years old, hitherto a man of good character, divorced with one teenaged daughter. His involvement in these proceedings brought a promising career

to an end, and he has been unable to resume a corporate career. In reality he has only been able to secure a limited amount of ad hoc consultancy work.

The agreement under section 73 of SOCPA 2005

16. Under the terms of the agreement entered into on 10 June 2009, following interview under caution on three occasions by the SFO in which the appellant made full and frank answers to all questions asked of him and a full confession to the totality of the matters in respect of which he was indicted, he provided the SFO with all the evidence available to him and has given what is believed to be a truthful account of the activities of all the others involved in the corruption. The appellant has agreed to provide such further assistance to the SFO as will be required of him. He has signed a witness statement which adequately reflects the totality of the evidence he can give in any subsequent criminal proceedings, and has undertaken to maintain continuous and complete co-operation throughout and until the conclusion of all proceedings. He has further agreed to provide full co-operation to any foreign competent judicial authority investigating the affairs of J & J, or DPI, or its executives or directions or agents or anyone benefiting from their criminality, and in particular agreed to assist the United States Department of Justice and the Securities and Exchange Commission. He has already twice been to the United States to assist in these investigations.

17. The terms of the agreement are clear. A criminal investigation into the affairs of DPI was being conducted by the Serious Fraud Office and the West Yorkshire Police. The agreement records that the appellant "has offered to assist in the investigation and prosecution of others and records the signing of the plea agreement. The terms include :

> "18. It is hereby agreed that John Dougall will assist the investigators and/or specified prosecutor in relation to the criminal investigation being conducted by the SFO into allegations of:
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> (a) Conspiracy to Corrupt, contrary to the Criminal Law Act 1977 and
>
> (b) Corruption, contrary to the Prevention of Corruption Act 1906 ("the Offences")
>
> 19. The Offences are in relation to the affairs of the Company; its Directors; executives and agents of the Company and other companies and individuals, in the U.K. and elsewhere.
>
> 20. Assistance under the terms of this agreement will include the following:
>
> a) John Dougall must provide the investigators with all facts, statements, documents, evidence or any other items ("information") available to him relating to the said investigation/offence(s) and give a truthful account of the existence and activities of all others involved;
>
> b) John Dougall will assist the investigators in making himself available for further interview, if and when required;

c) John Dougall must sign a witness statement or statements which, in the view of the investigators and specified prosecutor, adequately reflect the totality of the evidence that can be given in criminal proceedings instituted by the Director of the SFO;

d) John Dougall shall maintain continuous and complete cooperation throughout the SFO's criminal investigation of the Offences and until the conclusion of any court proceedings instituted by the Director of the SFO. Such cooperation includes but is not limited to him:

i) Voluntarily and without prompting, providing the investigators with all information that becomes known to him or available to him relating to the Offences, in addition to any such information already provided;

ii) providing promptly, and without the specified prosecutor using powers under any section of the Act or any other legal power, all information available to him wherever located, as requested by the investigators in relation to the Offences, to the extent that it has not already been provided;

e) John Dougall must also provide full co-operation with any other foreign Competent Judicial Authority or law enforcement body investigating the affairs of Johnson & Johnson DePuy ; it's Directors; executives; its agents or any other person or company benefiting from the criminality disclosed by any criminal investigation. This will include, but not be limited to, co-operation with the United States Department of Justice ("DOJ"; the Securities & Exchange Commission ("SEC") and any other foreign Competent Judicial Authority or law enforcement body that may investigate matters to which John Dougall can speak.

f) John Dougall must give truthful evidence in any court proceedings."

Discussion

18. For all the respectable and reputable fronts that many fraudsters and corrupt businessmen may present, they are criminals. What is sometimes described as white collar crime or commercial crime taking the form of fraud and corruption in particular is crime. And it is not victimless: sometimes identified individuals are victims, and at others, unnamed, unknown individuals in the entire community are victims, and sometimes the community itself is the victim. So often however the criminal activities are buried under mountains of paper and myriads of figures so that the process of investigation, and ultimately any trial, requires huge resources and painstaking and sometimes protracted study, examination and analysis. All that is immensely frustrating, and the "Guidelines on Plea Discussions" issued by the Attorney General in March 2009 was intended to address, and so far as possible, alleviate the problems. We need to take care, however, not to allow the issue of guidelines for the prosecution of cases of fraud and corruption to suggest that they are rather more respectable than other forms of crime, or to be persuaded that somehow or other those who commit fraud or corruption should not be ordered to serve prison sentences because such sentences should be reserved for those they would regard as

common criminals. Once convicted, those are the ranks that they join. Equally however, just as the administration of criminal justice does not treat those who commit offences of this kind as lesser criminals, there are no special rules which apply to the processes which apply when they come to be sentenced.

19. In this jurisdiction a plea agreement or bargain between the prosecution and the defence in which they agree what the sentence should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle. That applies to cases of this kind, as it does to others.

20. No such agreement is envisaged in the "Guidelines on Plea Discussions" issued by the Attorney General. These guidelines, which are said to have governed the plea agreement with which this case is concerned, are framed in unequivocal language.

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

(b) Where agreement is reached as to pleas, the parties should discuss the appropriate sentence with a view to presenting a joint written submission to the court. This document should list the aggravating and mitigating features arising from the agreed facts, set out any personal mitigation available to the defendant, and refer to any relevant sentencing guidelines or authorities. In the light of all of these factors, it should make submissions as to the applicable sentencing range in the relevant guidelines (D9)…in the course of the plea discussion the prosecutor must make it clear to the defence that the joint submission as to sentence (including confiscation) is not binding on the court (D12).

(c)…The prosecution should send the court sufficient material to allow the judge…to assess whether the plea agreement is fair and in the interests of justice, and to decide the appropriate sentence. It will then be for the court to decide how to deal with the plea agreement. In particular, the court retains an absolute discretion as to whether or not its sentences in accordance with the joint submission from the parties" (E4 and E5)

21. It is equally clear that no such agreement is in contemplation in ss71-75 of the Serious Organised Crime and Police Act 2005, where the statutory framework which formalised the well established common law principles relating to the advantages to a defendant who turned, in the old fashioned phrase, "Queen's Evidence".

> "There never has been, and never will be, much enthusiasm about a process by which criminals receive lower sentences than they otherwise deserve because they have informed on or given evidence against those who participated in the same or linked crimes, or in relation to crimes in which they have no personal involvement, but about which they have provided useful information…however, like the process which provides for a reduced sentence following a guilty plea, this is a long-standing and entirely pragmatic convention. The stark reality is that without it major criminals who should be convicted and sentenced for offences of the utmost seriousness might, and in many cases, certainly would escape justice…the solitary

> incentive to encourage co-operation is provided by a reduced sentence, and the common law, and now statute, have accepted that this is a price worth paying to achieve the overwhelming and recurring public interest that major criminals in particular, should be caught and prosecuted to conviction".

What the defendant has earned by participating in the written agreement system is an appropriate reward for the assistance provided to the administration of justice, and to encourage others to do the same. The reward takes the form of a reduced or lesser sentence from that which would otherwise be appropriate. (see *R v P*; *R v Blackburn* [2007] EWCA Crim 2290 at paragraph 22 and 41.)

22. It remains open to the defendant to seek the judge's view of sentence in accordance with *R v Goodyear* [2005] 2 CAR 20 and the guidelines subsequently laid down for such indications to be given in the Practice Direction (Criminal Proceedings: Consolidation) [2002] 1 WLR 2070 paras IV. 45.29-IV.45.33 (as inserted by the Practice Direction) Criminal Proceedings: Substituted and Additional Provisions [2009] 1WLR 1396. But the essential feature of that process is that the judge is expressing his view. It is also open to the parties to reach an agreement about the factual basis on which the defendant will plead guilty. This is often known as the "agreed basis of plea". However the agreed basis of plea is always subject to the approval of the court, and the judge is not bound by the agreement (IV.45.10 – IV.45.12). Neither of these processes involves an agreement between the parties about sentence.

23. Accordingly, although the prosecution should be involved in the process by which the sentencing court is fully informed about any matters arising from the evidence which may reflect on the defendant's criminality and culpability (including, of course, matters of mitigation) and of any positive assistance given to the investigating authorities by him, this process does not involve an agreement about the level of sentence. Indeed, look where we may, in our criminal justice structure, agreements between the prosecution and the defence about the sentence to be imposed on a defendant are not countenanced.

24. These principles were summarised in *R v Innospec Limited* in the sentencing remarks of Thomas LJ at Southwark Crown Court on 26 March 2010. He observed:

> "It is clear, therefore that the SFO cannot enter into agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged…although the sentencing submission proceeded to put forward a specific proposal as opposed to the range as set out in the authorities, that must have been because the provisions of the consolidated criminal practice direction had not been fully appreciated (para 26)
>
> The Practice Direction reflects the constitutional principle that, save in minor matters such as motoring offences, the imposition of a sentence is a matter for the judiciary. Principles of transparent and open justice require a court sitting in public itself first to determine by a hearing in open court the extent of

> the criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence. It is in the public interest, particularly in relation to the crime of corruption, that although, in accordance with the Practice Direction, there may be discussion and agreement as to the basis of plea, the court must rigorously scrutinise in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest (para 27)
>
> This has always been the position under the law of England and Wales. Agreements and submissions of the type put forward in this case can have no effect…" (para 28)

25. These observations accurately encapsulate the true constitutional position. Responsibility for the sentencing decision in cases of fraud or corruption is vested exclusively in the sentencing court (or on appeal, from that court, to the Court of Appeal Criminal Division). There are no circumstances in which it may be displaced.

26. We acknowledge that when the plea agreement in this case was concluded the Director of the Serious Fraud Office did not have the advantage of the observations made by Thomas LJ in *R v Innospec* Limited, and that when the case was opened before Bean J, Mr. Kelsey-Fry immediately acknowledged that, in effect, the terms of the plea agreement had gone further than they should. Nevertheless we must highlight the kind of feature of the plea agreement which caused us concern. Paragraph 20 reads:

> "The procedure laid down in the Guidelines is a new procedure and involves the parties presenting a joint submission as to sentence. As already observed the decision as to sentence is for the Court to make. In doing so, the Court is invited to give considerable weight to the following:-
>
> 1. The Director of the SFO recognises the value of this defendant's admissions resulting in a speedy conviction with considerable savings to the public purse as well as his considerable assistance to the SFO's and other authorities' continuing investigations. The Director recognises the public importance of persons admitting guilt at an early stage and assisting the authorities both here and abroad in these complex, multi-jurisdictional and often lengthy investigations into corporate corruption. Mr Dougall's approach in this regard is in marked contrast to others that have been interviewed as part of the SFO and DOJ investigations.
>
> 2. This is the first overseas corruption case in which an individual has cooperated with the SFO in this way. As is known by the Court, in the USA – all things being equal – the first person co cooperate with the

> investigating authority by entering into a plea agreement has a legitimate expectation as to the most favourable sentencing outcome particularly in a case whereas here the crime is conducted with corporate knowledge and for corporate advantage.
>
> 3. The Director respectfully invites the Court to consider a similar approach. It is the Director's position that there is a strong public interest in the Court giving and being seen to give these factors the fullest effect in determining the appropriate sentence."

27. To put it bluntly, this is advocacy, and would do credit to an accomplished advocate, advancing submissions in mitigation on behalf of the defendant. It does not simply and objectively draw the attention of the court to matters of potential mitigation.

28. At the very end of the document (para 42) it is recorded that

> "The court may conclude that, whilst the custody threshold is crossed, an immediate custodial sentence is not appropriate. In particular, the court would act wholly within its discretion by imposing a suspended sentence of imprisonment".

Paragraph 43 completes the text:

> "The Director of the SFO submits that such an outcome would be wholly consistent with the considerations of public policy attaching to this case, as outlined in this document.

29. That is as near as telling the court not only that a suspended sentence should be imposed, but, bearing in mind that the Director must know perfectly well that a suspended sentence involves a sentence of imprisonment of 12 months or less, and cannot be applied to a sentence of 13 months' or longer, it is remote from submissions about the *range* of possible sentences. The consequent problem is that the appellant himself knew what was being advanced by the Director and, as it seemed to us and was confirmed during the submission, this created an inevitable impression on him that the view expressed by the Director would carry far more weight than it would if it had come simply as a submission from his own advocate, with the inevitable consequent expectation that the court would be likely to accept it.

30. As it is, paragraph 20(1), 20(2) and 20(3) simply raise matters which would be treated by the court as matters of mitigation. The value of the defendant's early admissions of guilt, the considerable assistance given by him to the authorities investigating complex multi-jurisdictional corruption, and the public interest in bringing these cases to justice, as well as the contribution the defendant may already have made and intends to continue to make to that process is obvious. There is no objection to these matters being recorded, if appropriate in considerable detail, in the plea agreement: matters of aggravation and mitigation should be recorded, but they do not require advocacy. We believe that since this issue was addressed by Thomas LJ in *R v Innospec Limited* this will not recur.

31. We do however add this: in our jurisdiction there is no principle of any legitimate expectation to be enjoyed by the first person to co-operate with an investigating authority, that he (or she) will be the beneficiary of the most favourable sentencing outcome. Such conduct will, of course, normally provide substantial mitigation. But like all features of mitigation it has to be seen in the overall context of the case, the defendant's criminality and the level of his culpability, the circumstances in which he came to co-operate and the extent of his co-operation. The answer to the question, "who first co-operated?" does not answer the separate question of the appropriate level of sentence discount for that defendant.

32. The other troublesome feature of the case arises in the context of the written submission in support of the appeal. It is said to raise a short but important point of sentencing principle.

> "…In complex multi-jurisdictional financial investigations is the important public interest in encouraging putative defendants to co-operate fully with the prosecuting authorities and to give evidence for them sufficiently recognised by the reduction of the length of a prison sentence according to the guidelines laid down in *R v P and Derek Stephen Blackburn* [2007] EWCA Crim 2290, or does it, in appropriate cases, warrant the suspension of a sentence of imprisonment?"

A little later the written submission continues

> "…Unless a "white-collar" defendant, in an appropriate case, has the prospect of avoiding an immediate custodial sentence by fully co-operating with the authorities the important public interest in him doing so will not be secured. For such a defendant it is the fact of being sent to prison that matters, not the length of the sentence…"

33. Towards the end of the written submission we find that the court was invited

> "To apply the pragmatism that has driven sentencing policy in cases where the offender has provided full co-operation to the authorities and has given, or has agreed to give, evidence for them and recognise that in cases of multi-jurisdictional fraud or corruption where putative defendants are normally businessmen of good character the only realistic incentive for such a person entering into a section 73 SOCPA agreement is where, in an appropriate case, it will be open to the court to suspend the sentence of imprisonment that the offending warrants. "

The submission ends:

> "The only pragmatic way in which to secure the public interest is to recognise that what really matters to a "white-collar" offender is the chance to avoid an immediate custodial sentence rather than to mitigate the length of it…"

34. Asking the question whether "in appropriate cases", the suspension of sentence of imprisonment may be warranted, as the skeleton argument does, creates no difficulties, but it begs the essential question. If it is appropriate for a sentence to be suspended, then that is appropriate: if it is not appropriate, then it is not. The implication of the submission is that unless this appellant's sentence is suspended, cooperation from the criminal defendants in the SOCPA process will diminish virtually to extinction. It therefore follows that in a case where after making all due allowance for a guilty plea, and full co-operation by the defendant in accordance with a SOCPA agreement a sentence of 12 months' imprisonment is appropriate, the sentence must be suspended. We disagree. No sentence follows more or less automatically. The suspended sentence should only be imposed where there are particular features of the appellant's involvement in the crime, including the matters of mitigation, which justify it. That is fact specific.

35. As the argument developed before us we recognised that it was more attractive than it had seemed on first reading. In effect it arises from the relatively low maximum available sentence. On the view adopted in this case, following a guilty plea, the sentence would have been 2 years' imprisonment. The defendant would then have to serve no longer than 12 months, and might well have been subject to (fluctuating) early release and similar provisions. The allowance for him entering into the SOCPA agreement, and taking on the considerable burdens involved in it, led to a halving of the sentence appropriate after the guilty plea. We recognise that this is not a fixed tariff, and that there may be cases where the discount would be rather larger. The effect, however, is that the appellant, ordered to serve 12 months, must be released after he has served 6 months in custody, and again the early release provisions would apply. What then is the difference in practice between the defendant who pleads guilty at the first available opportunity, but does not give the co-operation and assistance involved in the SOCPA agreement, and the defendant who takes on the full burdens involved in being a party to such an agreement? There will still be a prison sentence, but no more than an additional few months, say 4-5 months, in actual custody. The consequence is that the reward for the full co-operation involved in the SOCPA agreement is relatively small, while the burdens taken on are substantial. From the point of view of the defendant it has nothing like the impact of a reduction in sentence from a 20 year sentence of imprisonment to, say, 6½ years, so that instead of serving 10 years he will in the end serve a little over 3 years. In these circumstances Mr Winter submitted that the reward which a defendant at the lower level of criminality in the context of major crimes of fraud and deception, after co-operating to the extent that the present appellant has co-operated, should not be an immediately effective automatic sentence.

36. In order to provide guidance to sentencing courts, we acknowledge that it would be unrealistic to ignore these considerations. We are not to be misunderstood as saying that in circumstances like those we have outlined here, a suspended sentence must always be ordered. What we indicate is that where the appropriate sentence for a defendant whose level of criminality, and features of mitigation, combined with a guilty plea, and full co-operation with the authorities investigating a major crime involving fraud or corruption, with all the consequent burdens of complying with his part of the SOCPA agreement, would be 12 months' imprisonment or less, the argument that the sentence should be suspended is very powerful. This result will

normally follow. This seems to us to face the practical realities and produce a pragmatic answer to the problem.

37. We emphasise the importance attached to the fact that this court has spelled out the appropriate guidance in cases where the appropriate sentence is 12 months or less. It has nothing to do with any sentencing agreement between the prosecution and the defence. It stems from our conclusion about the appropriate way in which sentences in this type of case, and in the circumstances we have outlined, should be approached. That preserves the proper constitutional position.

38. Standing back and addressing the facts of this case in the light of the guidance we have just promulgated, we concluded that given all the circumstances this was an appropriate case for the sentence of 12 months' imprisonment on the defendant to be suspended. We shall attach a supervision requirement, and quite apart from attending appointments as directed, the appellant will also be required to attend the Serious Fraud Office, as and when directed, in order to fulfil the SOCPA agreement.