Plea Bargaining and the role of the lawyer

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The complex and often cross-border nature of white collar criminal cases often leave the cost of investigation in the millions. Investigations are lengthy and involve massive use of resources. All this before the case even gets to trial where there will be further costs of court time, counsel fees and expert witnesses to list just a few.

Prosecutions are costly and convictions are difficult to obtain. The Government attribute the low conviction rates to the ignorance or credibility of jurors or the lack of a plea bargaining system not withstanding that the Government has failed to implement a coherent policy for policing white collar crime. The UK has suffered decades of Royal Commissions, Law Commissions, Working Groups and One-man/woman enquiries all recommending piecemeal remedies that, whether adopted or ignored, have created a myriad of prosecution agencies, each of whom interpret policies in their own way and none of whom succeed in fulfilling public expectations.

The aim of securing prosecutions simultaneously with cutting costs has, it seems, led the UK Government to consider a new approach. Although there is no equivalent in the UK and Europe to the DOJ in Thompson, or now McNulty, Memorandum, the European Commission has published its proposals for a leniency and cooperation programme. At the same time as these European reforms, the Attorney General has proposed the introduction of a formalised plea negotiation procedure into the English criminal justice system. The aim of such a proposal is to encourage more defendants to plead guilty at an early stage in fraud cases as well as to cut the cost and time involved in fraud trials and the investigations leading to trial.

It has long been the case in the UK that informal negotiations take place. There are often held in private between defence lawyers and prosecutors. There is the further option of a Goodyear Direction being requested by defendants in order to obtain an indication of possible sentence if a plea of guilty was entered. Despite this, there is a strong feeling within the English legal system that a US plea bargaining system would not be appropriate for the UK. In a recent extradition case, the Lord Justice of Appeal commented on such negotiations with a prospective extradite as follows:

“We make no secret of the fact that we view with a degree of distaste the way in which the American authorities are alleged to have approached the plea bargain negotiations. Viewed from the perspective of an English Court, the notion that a prosecutor may seek to induce a plea of guilty on the basis that substantial benefits will be withdrawn if one is not forthcoming is an anathema.”

Of course, no one would argue against early dialogue between prosecution and defence if both sides were of equal experience and expertise and both sides were fully aware of the Crown’s case including such weaknesses as are only known to the Crown. The preservation of the burden of proof and the presumption of innocence both impose fundamental constraints on consensual or collaborative justice and it is a key concern that due process will be maintained in a plea bargaining process.

The other key concern is the provision of legal services in plea negotiations. Until quite recently the UK has been a model of how legal services should be provided in cases where an individual or corporation finds themselves on the wrong end of an indictment. There has been no real history of undue pressure being brought on
individuals either to cooperate or to plead other than the encouragements listed above, and, in any event, whether by private funding, insurance funding or public funding, the individuals have been well-served as far as representation is concerned.

This may no longer hold true because recent drastic cuts in the legal aid budget in the UK have led to a wholesale desertion of the provision of publicly-funded defence by the experienced white collar crime defence Bar. It is too early to say what effect this will have on the quality of trials, or indeed on their fairness or on the incidences of wrongful convictions.

This paper is concerned with the proposals of introducing a plea negotiating system in the UK and the effect that this will have on the provision of legal services.

1. Plea bargaining in the UK: the existing procedure

1.1 Introduction

Opportunities for the prosecution to engage formally in discussions with the defence over possible pleas are more limited in England and Wales than in many other jurisdictions; there is at present no formal system of plea bargaining in UK courts.

Traditionally the criminal justice system in England and Wales has shied away from sanctioning any sort of formal plea bargaining system, primarily because of concerns about the need to retain judicial independence and ensure that no undue pressure was put on a defendant to plead guilty. However, the UK’s recent Fraud Review noted with a degree of approval that, in the US, around 95 per cent of fraud cases are resolved through plea bargains, making it the "dominant force in US courtroom procedure". The Review also found wide support from many sectors for the introduction of a properly sanctioned plea negotiation system in the UK. The Fraud Advisory Panel, for example, has long argued for a plea-bargaining system to be introduced in England and Wales and welcomed the Fraud Review’s recommendations on this issue, subject to appropriate safeguards to preserve the principles of fairness to defendants and victims and the general public interest.

1.2 R v Turner

Prior to R v Turner, it was not unusual for counsel to be seen (always separately from their solicitors) by the trial judge in his chambers, and for the judge to tell counsel his view of the sentence which would follow an immediate guilty plea. Archbold’s Criminal Pleading, Evidence and Practice (37th edn, 1969) says nothing at all, and certainly nothing critical about this practice. Whilst formerly an indication of sentence was common practice in the Crown Court, giving rise to an informal sentence canvassing process, the Court of Appeal in R v Turner sought to put an end

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1 The Fraud Review interim report
2 See The Fraud Review’s Final Report for further discussion
3 (1970) 2QB 321
4 See the comments of LJ Woolf in R v Goodyear, at 31
to private discussions between judge and counsel when likely sentence was canvassed.

In essence, *R v Turner* decided that whereas counsel may give advice, which includes advice about the likely sentence on a guilty plea, such information coming from the court itself was impermissible. The only exception to that rule being, ‘that it should be permissible for a judge to say, if it be the case, that, whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence.’

The *Turner* principles were subsequently consolidated in Part IV paragraph 45 of *Practice Direction (Criminal Proceedings: Consolidation)* and the Attorney General issued guidance to counsel for the prosecution on the acceptance of pleas, with observations about the duty of the advocate for the Crown when discussions leading to a sentence indication arose.

1.3 *R v Goodyear*

The Court of Appeal in *Goodyear* did not seek to water down the essential principle that the defendant's plea must always be made voluntarily and free from any improper pressure, however, their Lordships could not discern any clash between that principle, and a process by which the defendant personally could instruct his counsel to seek an indication from the judge of his current view of the maximum sentence which would be imposed. The five-judge court asserted that, in effect, this simply substitutes the defendant's legitimate reliance on counsel's assessment of the likely sentence with the more accurate indication provided by the judge himself.

However, the Deputy Lord Chief Justice remained emphatic that a judge should not be invited to give an indication in what would be, or what would appear to be, a “plea bargain”.

One reason why a formal plea bargaining system has not been practicable is because of the lack of certainty about the punishment that a defendant will face once the judge has been given the facts of the case and the antecedents of the offender.

In *Goodyear*, the Court of Appeal laid down guidance on judicial indications of sentence which superseded those in *Turner*. In summary, the guidance is as follows.

**The Judge**

1. A judge should not give an indication of sentence unless one has been **sought by the defendant**.

2. The judge remains entitled, if he sees fit, to exercise the power to indicate that the sentence, or type of sentence, on the defendant would

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5 “He should not be asked or become involved in discussions linking the acceptability to the prosecution of a plea or basis of plea, and the sentence which may be imposed. He is not conducting or involving himself in any plea bargaining”

6 Fraud Review Final Report, at 11.18

7 This Guidance is from Blackstone’s Criminal Practice 2007 – D11.76
be the same whether the case proceeds as a plea of guilty or goes to trial, with a resulting conviction.

3. He is also entitled in an appropriate case to **remind the defence advocate** that the defendant is entitled to seek an advance indication of sentence.

4. Where an indication is sought, the **judge may refuse altogether to give an indication**, or may postpone doing so, with or without giving reasons.

5. Where the judge has it in mind to defer an indication, the probability is that he would explain his reasons, and further indicate the circumstances in which, and when, he would be prepared to respond to a request for a sentence indication.

6. If at any stage the judge refuses to give an indication (as opposed to deferring it), it remains open to the defendant to seek a further indication at a later stage.

7. However, once the judge has refused to give an indication, he should not normally initiate the process, except, where it arises, to indicate that the circumstances have changed sufficiently for him to be prepared to consider a renewed application for an indication.

8. Once an indication has been given, **it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case.**

9. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect.

10. Where appropriate, there must be an agreed, written basis of plea, otherwise the judge should refuse to give an indication.

In *A-G’s Ref (No. 80 of 2005)*[^8], the Court of Appeal stated that:

- a. a hearing involving an indication of sentence should normally take place **in open court** (one of the exceptions is where a defendant is unaware that he is terminally ill);
- b. the principal feature of an appropriate indication of sentence is that an advance indication should be **sought by the defence**, and not promulgated by the judge;
- c. an indication should not be given that a trial would result in a much longer sentence compared to the one offered if the defendant pleads guilty.

[^8]: [2005] EWCA Crim 3367
The Defence

1. Subject to the judge's power to give an appropriate reminder to the advocate for the defendant, the process of seeking a sentence indication should normally be started by the defendant.

2. Whether or not such a reminder has been given, the defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client wishes to seek an indication.

3. The advocate is personally responsible for ensuring that his client fully appreciates that (a) he should not plead guilty unless he is guilty, (b) any sentence indication given by the judge remains subject to the entitlement of the A-G (where it arises) to refer an unduly lenient sentence to the Court of Appeal, (c) any indication given by the judge reflects the situation at the time when it is given and if a guilty plea is not tendered in the light of that indication, the indication ceases to have effect, and (d) any indication which may be given relates only to the matters about which an indication is sought.

4. An indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea or pleas to the indictment, or any factual basis relating to the plea.

5. Any agreed basis should be reduced into writing before an indication is sought.

6. Where there is a dispute about a particular fact which counsel for the defendant believes to be effectively immaterial to the sentencing decision, the difference should be recorded, so that the judge can make up his own mind.

7. The judge should never be invited to indicate levels of sentence which he may have in mind depending on possible different pleas.

8. In the unusual event that the defendant is unrepresented, he would be entitled to seek a sentence indication of his own initiative, but for either the judge or prosecuting counsel to take any initiative and inform an unrepresented defendant of this right might too readily be interpreted as or subsequently argued to have been improper pressure.

The Prosecution

1. As the request for indication comes from the defence, the prosecution is obliged to react, rather than initiate the process.

2. If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of the Goodyear guidance — that normally

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9 ibid
10 ibid
speaking an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a Newton hearing.11

3. If an indication is sought, the prosecution should normally enquire whether the judge is in possession of or has had access to all the evidence relied on by the prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant.

4. If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than (a) draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and (b) where it applies, to remind the judge that the position of the A-G to refer any eventual sentencing decision as unduly lenient is not affected.

5. In any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.

Magistrates' Court

It was deemed impracticable for these arrangements to be extended to proceedings in magistrates' courts. Accordingly, for the time being, the magistrates should confine themselves to the statutory arrangements in Schedule 3 to the Criminal Justice Act 2003.12

2. Plea bargaining in the UK: an evolutionary change

The problem with the existing UK procedure is that the informal discussion on acceptable pleas and a request for a Goodyear indication is likely to take place at a fairly late stage in the proceedings and perhaps only after a case has been fully prepared for trial.13 The proposals in the UK Government’s recent Fraud Review seek to address this issue by recommending that discussions on plea bargaining take place at a much earlier stage in the investigation and trial process.

2.1 Fraud cases

11 A trial of disputed issues of fact by the judge
12 Schedule 3, in dealing with the allocation of cases triable either way, and the sending of cases to the Crown Court, addresses the procedure where summary trial appears more suitable. The accused is entitled to request an indication of sentence, whether 'a custodial sentence or non-custodial sentence would be more likely to be imposed if he were to be tried summarily … and to plead guilty'. The court is entitled, but not obliged, to respond to such a request. In short, there is no longer any absolute prohibition against an advance indication of sentence.
13 'Plea bargaining – the way forward?', Fraud Intelligence, Ian Wilson, November 2006
The UK Government’s Fraud Review, published in July 2006, recognised that there are clear advantages in offering the parties in serious fraud cases the opportunity to consider reaching a court sanctioned agreement at a much earlier stage than hitherto. These relate to the large financial savings to the public purse that can be made by early disposal of even a few of these cases and easing the strain caused by delay on defendants, victims and witnesses; often the plea bargain will result in better and faster victim restitution than awaiting the outcome of a criminal trial. In some cases it would also give the investigators and prosecuting authorities more information at an early stage to allow a more focused and efficient investigation into the role of others involved in the criminality and with whom no such agreement is reached\(^{14}\).

The Fraud Review therefore proposed that a plea bargaining framework should be devised as a method to avoid the costs and time of full scale trials, estimating that savings could amount to £50 million a year: ‘In no other case can there be so much saving of public money and court time than in these fraud cases which take so long.’\(^{15}\).

2.1.1 The Recommendations

The Final Report recommended that a study be carried out into whether the introduction of the ‘Goodyear’ guidelines has had any effect on the rate of guilty pleas and their timeliness at the crown court.

The Report went on to recommend that there be a formal plea bargaining system agreed in principle specifically for cases dealt with by the Serious Fraud Office, the Fraud Prosecution Service in the CPS and serious and complex fraud cases brought by other prosecuting authorities. The detail of the system, including the justifications for confining it (at least initially) to fraud cases should be set out in a legal framework to be devised by a working group comprising appropriately senior figures from the judiciary, prosecuting authorities, the criminal bar and criminal solicitors' association.

The framework will cover the following:

- Provision for a suspect to be legally aided during pre-charge negotiations;
- The prosecuting authority's option to provide a case statement to a suspect and his representative as to the nature of the case and his role in it at the pre-charge stage;
- The suspect's option to respond to that statement with a 'without prejudice' statement setting out the extent of his accepted criminality and then for both sides to engage in 'without prejudice' negotiation to see whether an early agreement as to criminality can be reached; this negotiation to include a recommended realistic sentence package, to include consideration of the extended sentencing options considered in the Review;
- Access to a specialised fraud judge at a pre-charge stage to seek judicial approval of an agreed plea and sentence package or simply for the defence to

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\(^{14}\) The Fraud Review Final Report

\(^{15}\) Lord Thomas of Gresford, Lords Hansard Text for 14 March 2006, Column 1119
seek an early sentence indication from the judge prior to further consideration (i.e. early sentence canvassing).

**The Review does not endorse application of a US style system to the UK, nor does it consider a framework for plea discussions in fraud cases as a pilot for across-the-board implementation.**

Following publication of the Government Response to the Fraud Review in March 2007, the Attorney General established seven working groups to take forward key groups of recommendations. The working groups are chaired by senior public and private sector individuals and draw on the collective expertise and experience of a wide variety of stakeholders. Former Bar Council chairman Stephen Hockman QC, who is leading the working group on plea negotiations, submitted *The Introduction of a Plea Negotiation Framework for Fraud Cases in England and Wales: a Consultation* on the 3rd April 2008.

2.1.2 The Fraud Advisory Panel (FAP)\(^{16}\)

\(^{16}\) The Fraud Advisory Panel aims to raise awareness of the social and economic damage caused by fraud and to help the private and public sectors, and the public at large, to fight back. The Panel was established in 1998 through a public-spirited initiative by the Institute of Chartered Accountants in England and Wales (ICAEW). Today, it is a registered charity (no: 1108863) and company limited by guarantee (no: 04327390) in England and Wales. The Panel works to:

- Originate proposals to reform the law and public policy on fraud
- Develop proposals to enhance the investigation and prosecution of fraud
- Advise business as a whole on fraud prevention, detection and reporting
- Assist in improving fraud-related education and training in business and the professions, and amongst the general public
- Establish a more accurate picture of the extent, causes and nature of fraud

Members of the Fraud Advisory Panel include representatives from the law and accountancy professions, industry associations, financial institutions, government agencies, law enforcement, regulatory authorities and academia.

The author is a Director of the Fraud Advisory Panel.
The Fraud Advisory Panel, in their 2006 Report ‘Bring to Book: Tackling the crisis in the investigation and prosecution of serious fraud,’ stated that adopting a plea bargaining framework along lines long followed in the U.S. could have a dramatic effect upon the investigation and prosecution of serious fraud cases in England and Wales. The Panel highlighted the following advantages to such a system:

- It would enable the investigating authority to obtain a clear account of the fraud, and the persons responsible for committing it;
- It would serve to narrow the scope of the investigation and thereby enable the case to be brought to trial more speedily;
- It would lead to a reduction in the likely length of trial;
- It would enable the prosecutor to explain the case to the court in an easily comprehensible manner; and
- It would facilitate the conviction of other participants in the fraud.

3. The Attorney-General’s Guidelines

In 2000 the Attorney General issued guidelines on “The Acceptance of Pleas: The Role and Responsibility of the Prosecution Advocate” which reinforced the guidance in Turner. These Guidelines were revised and reissued in October 2005 and give guidance on how prosecutors should meet the objectives of protection of victims’ interests and of securing fairness and transparency in the process. They take into account the guidance issued by the Court of Appeal (Criminal Division) in various cases.

In particular the guidelines state that:

1. Unless there are exceptional circumstances, the process of justice must be transparent and therefore conducted in public. This includes both the acceptance of pleas by prosecution and also the sentencing process.

2. Only in the most exceptional circumstances should plea and sentence be discussed in chambers. When such a discussion does occur, the prosecution advocate must remind the judge that an independent record must be kept of the discussions. The same advocate must keep such a record and pass it to the prosecuting authority.

3. Where there is a discussion on plea and sentence and the prosecution advocate takes the view that the circumstances are not exceptional, then it is the duty of that advocate to disassociate himself or herself from any discussion on

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17 http://www.attorneygeneral.gov.uk/attachments/acceptance_of_pleas_guidance.doc
sentence. The advocate should not do or say anything which could be construed as expressly or impliedly agreeing to a particular sentence.

4. Additionally, where s35 Criminal Justice Act 1988 applies, the advocate should make it clear that the Attorney General may, if he thinks fit, seek leave of the Court of Appeal to refer the case for review.

4. Legal Advice

Peters & Peters responded to the Attorney General’s Office Consultation *The Introduction of a Plea Negotiation Framework for Fraud Cases in England and Wales*. It acknowledged within the recommendations and the Consultation Paper that anyone entering into plea negotiations must receive legal advice. It suggested in response that the basic requirements of such advice can be summarised as follows:

Access to lawyers who can advise:

a) On the procedure to which the accused is already subject;

b) The nature and possible outcomes of plea negotiation;

c) The consequence of such outcomes:

   i) penal, including loss of liberty, loss of reputation, financial penalty, disqualification, compensation orders, confiscation orders, community penalties and costs

   ii) civil liability - exposure to third party claims - the effect of a conviction by negotiated plea in any subsequent class action

   iii) the loss of employment or employment prospects

   iv) possible deportation or difficulties in obtaining a visa to enter certain countries

   v) the effect of the plea on investigations in another jurisdiction and the possible heightened exposure to an application for extradition to a third country

   vi) debarment from office or ability to bid for certain contracts (also a concern for corporations).

Ideally the corporate or individual would receive all the necessary advice from a one stop firm with the addition of counsel. Corporations may be able to do just that, because they have the means to instruct law firms with these skills if they so choose. Individuals, on the other hand, must rely on access funded by:
a) themselves - if their assets are adequate and not the subject of restraint orders which cannot ordinarily be varied to provide for such expenditure,

b) by insurance through Director and Officer policies which may or may not afford sufficient cover but will often be refused because the insured admits delinquency which is an excluded risk,

c) through the generosity and goodwill of a corporate employer, whose sentiment is very likely blunted by either itself being the victim of the fraud or where the corporation and officer/employee are alleged accomplices will nonetheless be hesitant to assist lest such largesse be criticised by shareholders and/or the agency with which the corporation is co-operating.

A salutary reminder of this problem is provided by an ongoing case in the United States involving the former partners of KPMG. In United States v. Jeffrey Stein the trial Judge dismissed tax fraud charges against a number of former partners of the accountancy practice because he found that they had been deprived of their constitutional rights as a result of the prosecution, so it was alleged, pressuring the firm to stop funding the accused ex-partners if they, themselves, wanted to arrange a satisfactory outcome for the firm as a whole. On 28 August 2008, the US appeal court upheld the decision to throw out the indictment of all 13 former KPMG executives. Judge Dennis Jacobs, chief judge of the US Court of Appeals for the Second Circuit, agreed that the constitutional rights of the defendants had been violated by the federal prosecutors by threatening to indict KPMG if it paid the legal fees of the defendants.

It is not ironic that corporations which are almost always well funded, and which are anyway both immortal and immune to imprisonment, should be best able financially to take care of themselves; whereas, loyal and long serving officers or employees can find themselves exposed to the vagaries and uncertainties of a criminal justice system made more oppressive by the prospect of enforced entry into plea negotiations without adequate professional assistance.

d) Funding may be provided by third party well-wishers. In practice these usually turn out to be few in number, and the suspect's previously dependable close friends who, if their emotions and wallets are still engaged, would prefer to provide for the suspect's dependents than enrich a bunch of lawyers.

e) The Public Purse.

The draft framework refers to the Criminal Justice and Immigration Bill 2007, now the Criminal Justice and Immigration Act 2008, and its provisions conferring powers to allow pre-charge legal aid to be granted in appropriate circumstances. Section 56(6)


20 U.S. v. Stein S1 05 Crim 0888 (LAK)
of that Act allows for the introduction of regulations which “may provide that, in prescribed circumstances, and subject to any prescribed conditions, a right to representation may be provisionally granted to an individual where:

a) the individual is involved in an investigation which may result in criminal proceedings, and

b) the right is so granted for the purposes of criminal proceedings that may result from the investigation”.

These regulations “may, in particular, make provision about:

a) the stage in an investigation at which a right to representation may be provisionally granted;

b) the circumstances in which a right which has been so granted

i) is to become, or be treated as if it were, a right to representation under paragraph 1, or

ii) is to be, or may be, withdrawn”

It will be vital to establish, prior to the introduction of any plea negotiation system, whether, and if so when, these regulations will in fact be introduced, what the “prescribed circumstances” will be and at which stage of the investigative process legal aid will now be available.

Legal aid, even if available at an early stage, is certainly not going to provide adequate remuneration sufficient to attract the sort of expertise and experience that is necessary to provide adequate support to a party to plea negotiations. Here again, one must recall recent confiscation proceedings by the Crown which have collapsed because the legally aided accused could find no senior member of the bar who was willing to undertake the work at the rate offered by the public purse.

The number of law firms and members of the Bar continuing to offer publicly funded advice and representation in serious and complex fraud matters has significantly diminished and is likely to diminish further as the full impact of the Carter Review becomes ever more apparent.

4. Conclusion

In conclusion, the issue may be less concerned with the suspect’s ability to pay counsel and rather with their ability to resist the state. Every lawyer must be concerned with the promotion and maintenance of an independent, professional, competent Bar, available to those who need its services, regardless of their ability to pay, provided that a just system is devised for rewarding the professional advocate. It is clearly iniquitous for yesterday’s high-flying executive to be discarded because of government pressure and then abandoned by the corporation to whose profits he
significantly contributed, at a time when he most needs the corporation’s support. When the balance between the spending of public money and the principle of a fair trial is weighed, it is a categorical imperative for this democratic society to tip towards justice.

(The views expressed in this article are those of the author alone, and do not necessarily represent those of Peters & Peters, or the Fraud Advisory Panel)

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BIBLIOGRAPHY


