UNIVERSITY OF SOUTHAMPTON

THE SERIOUS FRAUD OFFICE: A POLITICAL HISTORY

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ABSTRACT

This study offers an analysis of the history of the Serious Fraud Office (SFO). More specifically it aims to establish a dialogue between the operation of the SFO and its social context. Within this broad objective it attempts to answer four questions. The first asks why the SFO was created in 1987. The second concerns the extent to which the SFO has expanded the scope of commercial fraud prosecution. The third relates to the degree of correspondence between the SFO's operation, in terms of the types of cases it prosecutes, and its representation in the news media. And the fourth involves an examination of the limits of commercial fraud prosecution after the Guinness and Blue Arrow cases. These questions are designed to illuminate the conditions which were necessary for the state to mobilise its criminal justice apparatus against commercial fraud, the extent of that mobilisation, its ideological dimensions and its fragile and contingent nature.

The study is based on extensive field work in the SFO, including a systematic examination of its files. It attempts to combine this rich source of data with an analysis of the SFO as an institution.

TABLE OF CASES

REPORTED

R v Christopher Roberts (1991) C.C. (Scrimgeour Vickers (Asset Management) Limited).

R v Mahmoud Sabbagh (1991) C.C. (Natrocom Group).

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R v Nazmuddin Virani (1994) C.C. (BCCI).

R v Walker and others (1994) C.C. (Brent Walker One).

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R v Thomas Ward (1993) C.C. (Guinness Four).

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THE SERIOUS FRAUD OFFICE AND WHITE-COLLAR CRIMINOLOGICAL RESEARCH

INTRODUCTION

This study offers an analysis of the history of the Serious Fraud Office (SFO). More specifically it aims to establish a dialogue between the operation of the SFO and its social context. Within this broad objective it attempts to answer four questions. The first asks why the SFO was created in 1987. The second concerns the extent to which the SFO has expanded the scope of commercial fraud prosecution. The third relates to the degree of correspondence between the SFO's operation, in terms of the types of cases it prosecutes, and its representation in the news media. And the fourth involves an examination of the limits of commercial fraud prosecution after the Guinness and Blue Arrow cases. These questions are designed to illuminate the conditions which were necessary for the state to mobilise its criminal justice apparatus against commercial fraud, the extent of that mobilisation, its ideological dimensions and its fragile and contingent nature.

As part of a wider study on the investigation, prosecution and trial of serious fraud for the Royal Commission on Criminal Justice 1993 Michael Levi subjected the SFO to a thorough analysis including an examination of the disjunction between the SFO's representation in the news media and its real operation (Levi, 1993). There has, however, been no examination of the type of cases prosecuted by the SFO and whether these cases represented an expansion in commercial fraud prosecution.

This is an important, perhaps the most important, question concerning the SFO. As Levi has observed, the legitimating dimension of the SFO was central to its creation (Levi, 1995). However, the demands of legitimacy required more than simply the establishment of a new organisation if the SFO was to escape being portrayed as a mere cosmetic exercise like its predecessor the Fraud Investigation Group. In addition, it would also have to realise the

systematic prosecution of cases of commercial fraud in the criminal courts and also secure convictions in those prosecutions.

The SFO's record of securing convictions has been the subject of intense scrutiny in the news media. That scrutiny has challenged the SFO's capacity to secure convictions with the degree of frequency and efficiency expected of such a unique and ostensibly powerful organisation. The effect of the news media's representation of the SFO has been that it has failed to dispel the allegation which existed before its establishment that commercial fraudsters were immune from criminal conviction. However, in terms of the image in which it has been cast in the news media - that is as the police force of the City of London - it has dispelled the perception that organisations representative of power were immune from prosecution. This study aims to examine this assumption by a looking at three principal issues - the number of cases the SFO has proceeded against, the type of cases it has brought to trial and the extent to which the SFO has secured convictions in those cases. Amongst other things, it aims to examine the extent to which the SFO has expanded the scope of criminal justice intervention against organisations suggestive of economic power.

The nature of the expansion considered in this study has been focused on to unravel the SFO's image in the news media which has predominated for most, if not for all, of its existence - that is of an organisation committed to bringing the City of London within the discipline of the criminal law. One of the themes of the analysis is that the SFO's subsequent operation, and its role in society, cannot fully be understood without first examining its origins. The discussion therefore begins with a brief examination of the organisation of commercial fraud prior the creation of the SFO and then goes on to consider the reasons behind its establishment. The fourth chapter aims to catalogue the type of cases the SFO has prosecuted for the purpose of comparing its operation with its representation in the news media. This is followed in the fifth chapter by a discussion of the SFO's two most exceptional cases - Guinness and Blue Arrow - and their effect on the subsequent scope of commercial fraud prosecution. The aim of this discussion is to explore the events that led to the investigation and prosecution of those particular cases and examine why they came to be prosecuted. The final substantive chapter aims to develop the discussion in the fourth chapter, particularly the effect of Guinness and Blue Arrow on the scope of criminal justice intervention, by examining the way in which the SFO's prosecution policy has changed over the course of its history.

AN HISTORICAL ANALYSIS OF THE SERIOUS FRAUD OFFICE

All attempts to understand white-collar criminological phenomena begin with a theory of society. This, the only constant of white-collar criminology, is rarely made an explicit part of criminological research, but it is, and always has been, the most significant cause of variation within the discipline; informing the conceptual assumptions, empirical focus and general analysis of the research process. The first ever dispute in white-collar criminology between Edwin Sutherland and Paul Tappan - a dispute in which the very validity of the discipline was questioned - was, in essence, a dispute over how society should be understood. Tappan's uncritical theory of the state, on the one hand, allowed him to assume crime as unproblematic and insist that a legalistic definition of crime should be applied. Sutherland, on the other hand, critically questioned the state's monopoly on the definition of crime and called for a broader definition which acknowledged the capacity of "persons of high social status" and corporations to shape the scope of the law and its enforcement (Tappan, 1947; Sutherland, 1949 and 1983). The debate, in other words, centred on opposing ways of theorising the state and therefore society. The immense theoretical, analytical and empirical variation which has since characterised white-collar criminology can ultimately be traced to differences within the way that society is theorised - since it is this that ultimately determines what questions are asked, the data that is collected to answer them and how that data is interpreted.

This analysis of the SFO starts with the assumption that a thorough analysis of commercial fraud prosecution must acknowledge its relation to the historical context within which it is situated. A complete historical analysis should also involve an examination of eight separate but nevertheless closely associated fields of enquiry. These concern the definition of commercial fraud, its causes, the nature of the organisations and individuals who commit it, the techniques, strategies and general form of its commission, the creation of laws aimed at censuring it, the enforcement of those laws, the effects of legal censure and enforcement, and, finally, its social costs.

A failure to acknowledge either the relation of commercial fraud prosecution to its historical context or to appreciate the significance of any one of these fields of enquiry inevitably leads to a failure to understand the phenomena itself, and also to grasp its importance to understanding crime and the state's criminal justice apparatus. It has the effect of closing off white-collar criminology as a discrete area of enquiry. One of the great failures of early

white-collar criminological research in general was the inability to appreciate the significance of the inter-dependence of these issues. One of the great disappointments of contemporary criminological research had been the continued resistance to acknowledge their inter-dependence within discrete research projects.

This is reflected in how some criminologists have addressed one of the major sites of ambiguity within white-collar criminology - the term itself (Nelken, 1994). Despite Aubert's call to examine rather than confront the ambiguity (Aubert, 1977) - to look, in other words, at the process through which white-collar crime either becomes or avoids being labelled (Becker, 1963) - many criminologists still largely assume the term as unproblematic (see for example Croall, 1989).

Hazel Croall's essay, *Who is the White-Collar Criminal*, which equates white-collar crime with convicted occupational crimes, provides a prime illustration of how a failure to address the full range of issues relevant to white-collar criminological phenomena not only tends to produce contrived results, but also divests white-collar crime of its broader significance (Croall, 1989). Croall's major thesis is that the assumption that underpins many of the more theoretically significant studies on white-collar crime - namely that white-collar crime is largely committed by people and organisations which represent power - is false and that instead white-collar criminals are drawn from all social classes and from small and large organisations alike. The strength of Croall's argument lies in its appearance of empirical precision. Whereas other scholars have largely assumed that white-collar crime is committed by people and organisations which represent power (see for example Box, 1983), Croall appears to provide cogent evidence to the contrary by illustrating that the offenders prosecuted under consumer protection laws tend, by-and-large, to be small traders.

Croall's evidence, however, merely gives the illusion of precision. This is because her data, and therefore the conclusion she draws from it, is based upon a restrictive definition of white-collar which excludes all forms of social action other than those formally processed and labelled as crime. Although, in doing so, she aligns herself to a trend within white-collar criminology which has seen convicted crime fast become a central unit of classification (see for example Wheeler, *et al*, 1982; and Benson and Walker, 1988), her use of convicted crime contrives to distort her conclusion. Convicted crime, when compared with violations of administrative law for example, may be a relatively uncontested concept: "disarming critics who object that white-collar crime may amount simply to corporate conduct to which

radical criminologists take exception" (Levi, 1989: 88). However, it cannot be assumed as unproblematic in the context in which Croall applies the concept. Croall claims to measure a concept of white-collar crime which has an independent ontological reality when, in fact, what she is measuring is the product of a social process - those forms of social action which are proceeded against and which culminate in conviction. She confuses, in other words, a clearly observable social effect with something which her argument suggests is independently attributable to the form of behaviour which forms the subject of criminal offences.

This is not to say that Croall ignores the ambiguities inherent in the definition of white-collar crime which she uses. She does, for example, recognise the question of selective enforcement and, as such, the existence of other similar forms of social action which, although potentially criminal, are not formally processed as crime. Moreover, she also addresses the question of how the criminal law is constructed. However, neither of these issues are fully explored and are therefore prevented from unduly detracting from the one compelling interpretation of her evidence. The effect is that the significance of these issues in terms of the social distribution of "white-collar crime" is minimised, relieving her major contention of any uncomfortable contradictions. Croall's study appears precise for the simple reason that it fails to afford adequate recognition to the very issues which makes white-collar crime so imprecise. And thus, it is because of the definition of white-collar crime which she uses that her argument - made on the back of an arbitrary definition of white-collar crime riven with unresolved ambiguities - is possible.

The failing of Croall's study is that it is assumes that white-collar crime has a definition beyond its context. This is symptomatic of a wider process in which, as the area has matured, white-collar crime has been less studied because of its significance to crime and criminal justice in general, but as an end in its own right. Arguments become localised within white-collar criminology. The challenge becomes not so much understanding the subject matter but the demand to compete within a discrete dialogue that cuts across criminology, sociology and socio-legal studies. Croall's theory of society, her relatively uncritical perception of large corporations and a failure to recognise the constraints of her subject matter, but not "the reality uncovered by empirical observation", allows her to suspend an interrogation of the full panoply of questions which should be asked in white-collar criminological research (Croall, 1989: 158).

This closed approach to studying white-collar criminological phenomena has led criminologists, sociologists and scholars writing within the socio-legal tradition to discuss white-collar criminological phenomena in ways which assume the current institutional framework, rather than question it. The principal questions have become how best to enforce the law and organise regulation, rather than why these measures and definitions are used in the first place (see for example, Braithwaite and Grabosky, 1993). The institutions of white-collar crime control themselves are allowed to provide convenient answers to questions which, in their absence, would otherwise require analysis. They are permitted to dictate what white-collar crime is and how it will be sanctioned, how much punishment is appropriate and what emotions can be expressed, who is entitled to punish and wherein lies their authority to do so. As a consequence, more taxing questions which challenge the very basis of these accepted faiths no longer arise (Garland, 1990).

This study attempts to avoid this parochial approach and aims to question the SFO as institution by examining its origins and its operation in their historical context. It asks why, and to what extent, the criminal law was mobilised against commercial fraud. It aims to develop some of Levi's observations on commercial fraud by applying Carson's historical approach to studying the enforcement of the early Factory Acts (Levi, 1987, 1993 and 1995; Carson, 1980). Where possible it attempts to acknowledge the full range of questions which must be addressed to fully understand white-collar criminological phenomena. However, a thorough and sustained examination of these questions was necessarily limited by the methodological restraints encountered in the field work.

THE FIELDWORK

White-collar criminological phenomena - the creation of the laws relevant to the definition white-collar crimes, the crimes themselves and their enforcement - tend to exaggerate the methodological problems generally involved in criminological research. The single most important problem in this enquiry proved to be obtaining access to data. This was fundamental in determining the objects of this enquiry.

When the original terms of this project were first devised in March 1992 it was not intended to be an historical study. Serious fraud prosecution had once again become an issue of relative political importance. March was the month following the end of the Blue Arrow trial, which had seen eight of the original defendants acquitted on the direction of the trial

judge, and the collapse of the second Guinness case. These cases had inspired an immense amount of criticism in the news media relating to a variety of aspects of the SFO's operation. Amongst others things, it was accused of an over-zealous use of its section 2 powers, a pronounced tendency to arrest defendants for charge under the scrutiny of the news media when a summons could have readily been served, preferring indictments which produced unacceptably long trials and generally proceeding against defendants in an oppressive manner. Against the context of these criticisms two broad lines of enquiry seemed ideal subjects for analysis.

The first concerned the extent to which these criticisms were reflected in the SFO's general operation and the degree of correspondence between the 'reality' of the SFO's operation and that of the police, Crown Prosecution Service (CPS) and the courts in the context of more 'conventional' crime. This seemed a valuable object of enquiry for two reasons. Firstly, it offered an opportunity to examine the differences between the control of white-collar crime and conventional crime. Although this has been a central issue in white-collar criminological research since Sutherland delivered his land-mark address to the American Sociological Association in 1949 with some notable exceptions (see for example Pearce and Toombs, 1992) it had ceased to become the principal subject of white-collar criminological enquiry - even though, ironically, the subject of white-collar crime was becoming a more popular object of study. Secondly, it provided an opportunity to examine why the news media had characterised the SFO as a fundamentally coercive organisation given that such a characterisation was only ever applied to discrete aspects of conventional policing and prosecution.

The second broad line of enquiry concerned the role of the judiciary in serious fraud trials. A brief review of the news media's reports on past SFO cases suggested that the judiciary had played a central role in securing the acquittal of defendants either in the form of directed acquittals or as a result of appeals to the Court of Appeal. There seemed to be the possibility that the judiciary through its interpretation of ambiguous rules of evidence (see McBarnett, 1981) had been responsible for limiting the scope and extent of criminal justice intervention against white-collar criminals.

With these two ideas in mind I wrote to the SFO asking to read the trial transcript it had in its possession and to interview its staff. Fortunately, my application for access coincided with a deliberate policy within the SFO to open itself up more to the outside world and my

request for entry into the organisation was accepted. This was clearly a turning point in the research. The project would have needed to have been either radically revised or abandoned if entry had been refused. It did not, however, prove to provide the access necessary to pursue the lines of enquiry I had originally identified. The length of serious fraud trials meant that it would not be possible to read all the SFO's cases. However, even reading the transcripts of proceedings of a representative selection of its cases proved to be impossible since the SFO only possessed transcripts of a small proportion of the cases it had brought to trial. A second and more important problem concerned my request to interview the SFO's staff. Although George Staple, the then Director of the SFO, had agreed in principle to allow me to interview lawyers at the SFO he predictably wanted a list of the questions I intended to ask so that he could determine whether or not they accorded with the legal restrictions dictating the type of information that could be communicated. This was inimical to the semi-structured interview schedule which I anticipated would be necessary to obtain the information required. It was not, however, an immediate problem since the questions I hoped to ask would have to relate to specific cases and it was therefore important first to gain an understanding of those cases.

The next nine months at the SFO were spent reading extracts of the transcripts of the first, second and third Guinness trials, the Barlow Clowes case and the Blue Arrow trial. This proved useful to gaining a background to the cases, but the objective of linking acquittals to the role of the trial judge proved far too ambitious. The transcripts were far too long to review an adequate sample of trials. More importantly, it proved difficult to find adequate comparisons in conventional criminal trials which would provide the control necessary to assess the judiciary's role in facilitating the acquittals of serious fraud defendants.

The second limb of my enquiry - interviews with SFO staff - seemed to be the only valuable avenue of acquiring meaningful information. This, however, involved a number of problems. In the first instance, some of the SFO's staff seemed to have a selective reluctance to sharing even the most basic information. A good example of this was the explanation given by a senior lawyer who was closely involved in the Blue Arrow case concerning why the case had been isolated for criminal investigation. He told me that the case had been accepted for investigation after Barbara Mills had agreed with the DTI's provisional view that its investigation into the Blue Arrow rights issue had found evidence of suspected criminal offences.[1] Further questioning aimed at encouraging him to elaborate proved unproductive. This did not conclusively demonstrate that the answer given was incomplete. It might have

been the case that there were no other considerations involved in either the DTI's referral or the SFO's acceptance of the case and that the decisions were simple technical matters based on the legal merits of the case alone. This, however, is unlikely given the data contained in the following study which illustrates that political considerations often inform the decision to process a case through the criminal justice system. Alternatively, the lawyer might have been unaware of any extra-legal considerations or that he was keen to stress that his involvement in the case was warranted by both the suspicion of the DTI and the approval of the Director. Whatever the reasons, exchanges such as this were a cause of some despair. More generally, I had had the opportunity to listen to tapes of previous interviews between SFO staff and journalists. Some related to specific cases but the information communicated tended to be confined to an account of the evidence at trial. What was more common, however, was for the SFO's staff to decline to answer questions on specific cases. This policy did not seem to be strictly followed, but it was a device which was commonly invoked in relation to ongoing cases and where the relevant member of staff did not want to be drawn into a discussion on a particular case either, for example, to avoid causing embarrassment to the organisation or to avoid upsetting individuals or organisations involved in the case in question. This, however, did not constitute a fundamental obstruction to acquiring the necessary information, but it nevertheless suggested that I would encounter profound problems in obtaining accurate answers to 'case-specific' information.

As the options for obtaining reliable but valuable information began to recede I was offered a contract of employment in the Press and Information Office to compile an historical record of all the SFO's cases. This proved to be another significant turning point in my research. It placed me on the ninth floor of Elm House, the SFO's headquarters, where all the SFO's most senior staff, including the Director, were based. I was employed on the basis that I was an active PhD student who was writing a thesis on the history of the office. When asking me whether I would compile the record, Georgina Yates (the then head of Press and Information), who had discussed the matter earlier with Jenny Rowe (the then head of personnel and finance) persuaded me that it would both help them and further my own research goals. To this I replied that it would be 'beautifully symbiotic', and she agreed. From the outset there was a clear understanding that I could use any data gathered during my work at the SFO in my thesis. When, for example, I was nearing the end of my employment with the SFO, George Staple asked me whether I had at last obtained sufficient information to write up. It was only after I had left the SFO (after an article on the SFO in *The Lawyer* reported that I eventually hoped to write a book on the Office) that James

O'Donnoghue (the incumbent head of Press of Information) passed on a message to me from Brian Steiner (the incumbent head of Personnel) that if I was intending to publish a book based upon the information I had acquired at the SFO then I should provide the relevant staff at the Office with the opportunity to see it before publication. Significantly, the question of my thesis was not raised. In fact, on the basis of the optimistic projected time for completion that I had given James O'Donnoghue, he and Brian would have been operating under the impression that I had already been awarded my PhD (provided everything had gone well of course).

As an immediate avenue into exploring the SFO's cases, however, the historical record initially proved to be of little value. The information I was employed to put on the record - such as trial dates and the outcome of cases - was relatively technical and inadequate to form the basis of further enquiry. It did, however, enable me to talk to the lawyers who frequently came into the Office on an informal basis, but even this was less fruitful than I had hoped since it soon became apparent that lawyers tended to give relatively anodyne answers to questions which were meant to elicit the politics of the SFO's operation.

The benefit of the record to my research was not simply that it afforded me access to a wide range of information, but it allowed me to pursue a line of enquiry which I had begun to identify as highly significant: namely that, contrary to the impression given in the news media, the SFO's cases rarely involved either large public companies or financial institutions located in the City of London. To this effect, I was given complete access to the SFO's 'dead file' store which formed the basis of my analysis of the cases in the fourth, fifth and sixth chapters.

The quantitative analysis of the SFO's cases was primarily based on cases statements, statements of the evidence, police reports, accounts reports, briefs to counsel, accountants analyses, reports compiled in pursuance of Department of Trade and Industry enquiries, reports produced by self-regulatory organisations, briefs to counsel, news paper cuttings and information from Companies House.

The qualitative analysis in the fifth and six chapters should be read with a degree of caution. Since it is primarily based upon the SFO's files it is dependent on what is written down and how decisions are recorded. Some of the SFO's files were in a state of disorder. Not every decision was recorded, there was immense variation in the degree of detailed explanation on

the crucial decisions of accepting a case for investigation, charging and proceeding with a prosecution. It also appeared that not all documents had been placed in the 'dead file' store.

It may have been valuable to have complemented the analysis of the files with interviews with SFO's staff. The precise value of this, however, is questionable given the reasons explained above. In the event, however, the fieldwork was constrained by the time taken to read through the SFO's files and isolate information-rich records and by financial resources. My day-to-day contact with SFO staff, however, did give me a broader sense of how the SFO's operation had changed over time in response to specific events. In particular, it gave me an insight into how the decision-making process within the SFO during the period of my fieldwork had been shaped by its previous operation and how this had been characterised in the news media, Parliament and, possibly, Government (although I never found any direct evidence to this effect).

A second note of caution concerns the reconstruction of specific cases. The fact that not all information was recorded means that my reconstruction of events is necessarily incomplete. Exchanges may have been made which were not recorded which put a different emphasis on a particular aspect of the decision-making process - tending to distort the analysis.

The constraints of time also meant that certain fundamental aspects of commercial fraud prosecution were not fully explored. A truly comprehensive analysis of the SFO would have required the following - a systematic analysis of the types of cases prosecuted before the creation of the SFO, an examination of the relationship between development of the economy and the apparent rise in commercial fraud, and finally an account of the historical dynamics of definition - how problematic commercial events come to be defined as fraud and how this changes over time.

Nonetheless, having worked in the SFO and established a rapport with its staff, I was given privileged access to information which made possible the construction of an empirically rich analysis of the SFO.

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[1] Personal communication (undated).

COMMERCIAL FRAUD PROSECUTION BEFORE THE ESTABLISHMENT OF THE SERIOUS FRAUD OFFICE

INTRODUCTION

To understand the SFO we need first to understand its origins. The SFO cannot, as some writers have assumed (see, for example, Weait, 1995), be divorced from possibly the most significant and remarkable trend in commercial regulation during the 1980's: namely, the concerted attempt - orchestrated from within Central Government - to exploit the criminal law as a more central means of controlling the organisation, exchange and transfer of financial capital. The process was especially remarkable given its timing. After decades of neglect by the Department of Trade the principal institutions of criminal justice and, more importantly, Central Government (which had not instituted a major reform in the area since the 1940s) now vigorously promoted criminal justice as a medium of commercial regulation. Paradoxically this development took place at the same time as the Government was embarking upon a programme to remove, rather than impose, legal constraints on business. The pace of change as well as its substance added to the sense of dramatic transformation. In little under a decade, a wide-ranging series of reforms (which included changes to the laws of evidence and procedure as well as to the organisation of commercial fraud prosecution) had been introduced, culminating in 1988 with the creation of the SFO, a wholly new and independent organisation that was designed to co-ordinate the prosecution of the largest, most complex and politically sensitive cases of commercial fraud.

According to Barbara Mills (a former Director of the SFO) the SFO had been established as a 'flagship organisation' which would at once vividly encapsulate the changes that were taking place, and manifest the state's commitment to the prosecution of commercial fraud (SFO/IC2, 1992). As such, the expectations placed upon the SFO were high. As a flagship organisation it would not only be required to command a high public profile, it would also

have to demonstrate that where large-scale commercial fraud was publicly suspected, it was being seriously investigated, and that when cases had been investigated there was a strong prospect that they would lead to convictions in the criminal courts (Levi, 1993b).[1] To this latter effect, the SFO has never truly met the expectations of the politicians and civil servants who engineered its creation. Although, as of April 1995, just over sixty two per cent of the defendants that it brought to trial had been convicted (SFO, 1995), its image as an effective prosecution agency has been marred by a series of well-documented failures to prevent some of its more prominent defendants from being acquitted. The failure of the SFO as a flagship organisation has not, however, resigned it to obscurity. On the contrary, it has attracted, and continues to attract extensive coverage in the news media, far greater than that given to any of the other reforms that have been implemented.

There are many reasons for the news media's enduring fascination with the Serious Fraud Office - too many for any form of serious analysis at this stage of the discussion. As the argument unfolds, however, it will become apparent that it owes much to its involvement in the prosecutions that emerged from the Department of Trade and Industry's investigations into Guinness's take-over of Distillers in 1986 and the ill-fated Blue Arrow rights-issue of 1987. These prosecutions were central in projecting the SFO to the forefront of public debate. They served to capture the imagination of news journalists, define the SFO's subsequent coverage and helped to ensure that it would rarely again be free to operate in the absence of close and often critical media scrutiny, a position it had largely enjoyed before the cases had completed their course through the courts. As a consequence of this, the SFO has, despite its failures, become the most potent symbol of the state's attempt to promote criminal justice intervention as a means of commercial regulation. Moreover, because its coverage in the news media has greatly exceeded that given to any of the other measures that were introduced, it has tended to overshadow them, and has come to singularly embody the reforms undertaken in the 1980's. In the process it has assumed a degree of significance well beyond the small number of prosecutions that it has brought to trial which as of April 1995 stood at just one hundred and thirty nine (SFO, 1995). This, however, should not obscure the fact that it was but one of a series of reforms, stretching back to the early 1980's, which, in many important respects, were just as much a part of the state's attempt to promote criminal justice intervention as a means of commercial regulation.

Some of these other measures, such as the transfer for trial mechanism, were explicitly

introduced to complement the investigative and prosecution functions of the SFO and, without them, its capacity to process cases through the criminal courts would have been substantially reduced. Not every reform, however, was introduced with the sole purpose of servicing the operation of the SFO. Many others, such as section 8 of the Police and Criminal Evidence Act 1984 and sections 23 and 24 of the Criminal Justice Act 1988, also had the effect of enhancing the power of the existing agencies of criminal justice to investigate and prosecute cases of commercial fraud. Others still, like the creation of *ad hoc* Fraud Investigation Groups in 1981, and their institution on a more formal basis in 1985, were independent of the SFO and had no direct bearing on its operation. Taken in their entirety it is possible to divide the reforms into four distinct categories. First, a rationalisation of the existing organisational framework of commercial fraud investigation and prosecution was undertaken, which was designed to optimise the proportion of cases that were prosecuted and liable to end with a conviction. Second, changes were made to the professionally administered regulatory apparatus and to the state's bureaucratic machinery responsible for commercial and financial regulation. These were intended to facilitate effective criminal justice intervention. Third, reforms to the evidential and procedural rules that governed the investigation and prosecution of commercial fraud were introduced which were intended to expedite the course of cases through the criminal justice process. Lastly, and perhaps most significantly, increased resources were made available to realise the potential of the measures that had been implemented.

Although these measures seemed to be designed to increase the emphasis placed on criminal justice as a means of commercial regulation, it is important not to overstate their extent. They were clearly not intended to radically transform the entire apparatus of regulation from a largely administrative-based system to one primarily organised around criminal justice control. This would have demanded a far more fundamental revision. More specifically it would have required both a radical extension in the scope of the criminal law and the development of a far more substantial institutional edifice to enforce it. New criminal offences were created, but these generally tended to be narrowly defined measures which were either aimed at outlawing specific forms of commercial behaviour or had the effect of making a relatively minor extension to the scope of criminal liability.[2] Although the re-invigoration of existing offences, such as conspiracy to defraud,[3] was arguably equivalent in its extension of criminal liability, the combined effect of both of these developments was still insufficient to extend the ambit of criminal liability so that the entire

scope of commercial regulation could be brought under the direct supervision of the state's criminal justice apparatus. The primary responsibility for regulating the financial service industry, for instance, was vested in the regulatory apparatus introduced by the Financial Services Act of 1986 (FSA). The Act made provisions for self-regulatory organisations (SRO's), such as the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), and recognised investment exchanges (RIE), such as the Stock Exchange. These organisations and institutions were, under the guidance of the Securities and Investment Board (SIB), made primarily responsible for devising, monitoring and enforcing rules of practice and membership.[4] Although this administrative framework of rules was underpinned by the criminal law,[5] the regulation of financial institutions as a whole nevertheless remained firmly administrative in character.[6]

The overriding emphasis on administrative control of commercial regulation is not, however, to suggest that the reform process was merely a cosmetic exercise aimed at providing symbolic testimony to the universal application of the state's law-and-order agenda.[7] The reform process, and the formation of the SFO in particular, did have symbolic dimensions, and the criminal justice machinery that was eventually installed did serve to impose fundamental structural limitations on the scope of criminal justice intervention. But the measures that were undertaken nevertheless had some substance. They might not have extended the jurisdiction of criminal justice into every sphere of finance and commerce, but they did provide the state's criminal justice apparatus with the capacity to expand the ambit of criminal justice intervention in practice and, in this respect, marked a unique juncture in the historical relationship between the state's criminal justice machinery and commercial regulation.

Criminal justice had historically been confined to the margins of commercial regulation. It was neither oriented nor sufficiently equipped to support the systematic investigation and prosecution of commercial fraud. In the 1950s, for example, there was only one lawyer within the Director of Public Prosecutions' Office who worked full-time on the prosecution of all the major frauds in London.[8] Although the resources allocated to commercial fraud prosecution gradually increased over the years (Levi, 1987), even by the 1970s the prosecution of a major fraud would still completely overwhelm the departments that had been designated to investigate and prosecute commercial fraud (see below). There were a variety of reasons for this, but it was ultimately because the relevant departments neither

possessed the legal powers nor the resources to sustain all but a small and unrepresentative sample of the cases that came to the attention of the authorities (see below). The reforms were therefore exceptional as they promised to afford the state's criminal justice apparatus with both the legal powers and the resources to process a greater number of cases through the criminal courts.

This was not the only reason why they were unique. The very idea of comprehensive reform to the criminal justice machinery of commercial fraud control was, itself, unprecedented. The last significant measure to have been introduced was the creation of the Metropolitan and City Police Company Fraud Department (MCPCFD) (Home Office, 1985). This, however, was a limited measure which, in the main, only served to provide a permanent organisational basis for the investigation of commercial fraud. Moreover, the MCPCFD had been formed in 1946. Thirty years had thus elapsed since the last significant reform had been introduced to enhance the state's capacity to mobilise the criminal law against commercial fraud.

What seemed even more remarkable, however, was the fact that the reforms were introduced during the 1980s - a period dominated by successive Conservative Governments. If they were, as they seemed, aimed at enhancing the capacity of the state's criminal justice apparatus to intervene in the operation of the financial services industry, publicly quoted companies and other business concerns, then they appeared to actively contradict the Conservative's declared neo-liberal ideology to roll back the frontiers of the state and lift the restraints from managers' right to manage.

To understand why these reforms were undertaken, to examine their intended impact and explore their apparent contradiction with the Conservative's neo-liberal politics, it is necessary to situate them within their specific historical context. Although their immediate objective was oriented to the prosecution of commercial fraud, they cannot be explained in terms of this objective alone, not least because the concept of commercial fraud itself is so vague and equivocal. To undertake a serious analysis of the development of commercial fraud prosecution, it is therefore important to first understand the concept itself - its scope, its complexity and, above all, its historical specificity.

THE CONCEPT OF COMMERCIAL FRAUD

There are two major problems with using the concept of commercial fraud as a unit of analysis to understand the reforms to commercial fraud control in the 1980s. Both concern different but associated aspects of its relationship to the criminal law - the first relating to the unresolved nature of commercial fraud, the second concerning its scope.

To begin to understand the relationship between commercial fraud and the criminal law is to first recognise that fraud is a social construct which is created on the application of the criminal label. Fraud, in other words, is wholly dependant on the mobilisation of the criminal law, and, in this sense, is inseparable from it. There are several dangers with this proposition and one in particular which deserves immediate attention.

Since fraud (at least in the context of this study which is concerned with the prosecution of fraud) does not and cannot exist independently of the criminal law there is a temptation to assume that the criminal law at once determines and pre-determines the ambit of fraud; especially as the substantive criminal law is sometimes theorised as a relatively fixed body of rules encompassing a closed set of principles. This is an assumption which is easily made. However, it rests upon a confused understanding of the primacy that the criminal law takes in defining the scope of fraud. To resolve this confusion, it is necessary to examine the form of the relationship between fraud and the criminal law. Once this examination is undertaken it becomes apparent that the criminal law does not impose itself unilaterally on the scope of commercial fraud, that the criminal law is not closed and that neither, as such, is commercial fraud.

One problem which is immediately encountered in examining the form of the relationship between the criminal law and commercial fraud is that there is no offence of fraud - let alone commercial, company, serious or financial fraud[9] - in the criminal law (Arlidge and Parry, 1996: 1). Neither fraud nor commercial fraud have any clearly defined legal origins, although this is not to say that the criminal law has absolutely no relation to the definition of fraud. On the contrary, the criminal law bears on its definition in two respects.

Firstly, although the criminal law does not recognise an offence of fraud it does recognise a concept of fraud. As Arlidge and Parry have observed, there are some offences to which the element of fraud is 'not just essential but central', such as conspiracy to defraud and

fraudulent trading (Arlidge and Parry, 1996: 1). In relation to these offences the only additional element to defrauding someone is that of a conspiracy or agreement in the first offence and the requirement of the use of a company in the second (for a more detailed discussion see Arlidge and Parry, 1996: 45-66).

The second way in which the criminal law bears on the definition of fraud relates to how the term is used rather than how the concept is incorporated within specific criminal offences. To this effect, fraud is commonly understood as a generic term (see, for example, Kirk and Woodcock, 1992: 1) which both involves and denotes the violation of substantive criminal offences, such as theft, obtaining property by deception and false accounting. Thus, notwithstanding the relatively obscure relationship between fraud and the criminal law, in one sense at least, the criminal law ultimately defines the limits of commercial fraud. What is important to recognise in the context of this discussion, however, is that the criminal law is not absolute in pre-determining the forms of conduct which can be brought within its scope.

Without the application of power, the criminal law is merely an inert code of rules. Although it informs the decision of criminal justice agents to investigate and prosecute,[10] its definition only truly becomes apparent when it is applied within the context of specific prosecutions. The application of the criminal law to real instances of social conduct can and does exert a considerable influence on the legal definition of fraud. Cases can, for example, be brought to trial which force the courts to explicitly revise the meaning of the terms of specific criminal offences. So, before the House of Lord's decision in *Scott v Metropolitan Police Commissioner* (1975), it was generally assumed that there could be no fraud without a deception. The classic authority for this position was *Re London and Globe Finance Corporation Ltd* (1903) in which Buckley J. stated: 'To defraud is to deprive by deceit.'[11] Although there was other authority suggesting otherwise,[12] it was not until the ruling in the *Scott* case that the House of Lord's conclusively settled that deception was not an essential element of fraud: Viscount Dilhorne stating that: '....'to defraud' ordinarily means...to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.'[13]

Alternatively, whilst not producing an explicit revision in meaning, the courts can, when faced with a real case, interpret a specific element within an offence to either exclude the

facts of a case from its compass (see, for example, *Gallasso*, 1993) or embrace them (see, for example, *Gomez*, 1993). Two recent decisions turning on the meaning of appropriation in the offence of theft illustrate this point perfectly, as well as showing how cases involving simple fraud can influence the scope of commercial fraud by modifying the scope of offences which are used to prosecute it. In the case of *Gomez* (1993), the House of Lords held that the fact that the owner of property had given his consent to a transaction on the basis of a misrepresentation on the part of the defendant did not preclude the acquisition from being an appropriation within the meaning provided by section 3(1) of the Theft Act 1968. This decision was generally considered to mark a radical extension in the way that the concept of appropriation had been interpreted since the earlier House of Lords case of *Morris* (1984)[14] and it was central to the SFO's application to the Divisional Court in its case against Asil Nadir to reverse the trial judge's decision to dismiss the theft charges against him at the preparatory hearing (*R v Central Criminal Court, ex. p. Director of the Serious Fraud Office*, 1993). However, although the House of Lords' decision in *Gomez* was, as it transpired, central to the Divisional Court's decision to overturn the trial judge's ruling in the *Nadir* case, the question of appropriation, and with it the proper interpretation and scope of the *Gomez* decision, still had to be considered in the specific context of the *Nadir* case. To this effect, as the case of *Gallasso* (1993) illustrates (see Arlidge and Parry, 1996: 104-105), it was by no means certain that the Divisional Court would apply the House of Lord's decision in *Gomez* to overturn the trial judge's ruling to quash the theft counts.

The two examples above demonstrate that rather than impose itself unilaterally on the scope of commercial fraud, the scope of the criminal law is itself altered by real cases. The definition of the criminal law in the context of commercial fraud, in other words, at once controls and depends upon its mobilisation against specific instances of commercial fraud (and other forms of social conduct which fall within the same offences), yet, it is still the forum of the trial in which its real limits are expressed - where they are clarified, affirmed or changed. Significantly therefore, it follows that the limits of commercial fraud are also unresolved, ultimately dependant on both the inclination and capacity of the institutions of criminal justice to apply the criminal law to specific instances of commercial fraud (Levi, 1987: 100).

The capacity of real cases to produce a variation in the meaning and therefore definition of criminal offences is not, however, the only sense in which the limits of commercial fraud are unresolved. One of the striking features about the offences which are commonly used to prosecute cases of fraud is the broad way in which they are defined. Take the offence of conspiracy to defraud, for example. Its basic ingredients are dishonesty and an agreement involving an intention to prejudice the interests of another. No deception is required (see *Scott*, 1975), nor is there any requirement that the defendants actually cause anyone to suffer financial loss or to enrich themselves (*Welham*, 1961; *Wai Yu-tsang*, 1991). Thus, notwithstanding the requirement of a conspiracy, all that distinguishes conspiracy to defraud from legitimate competition is the element of dishonesty.

The emphasis that conspiracy to defraud places on dishonesty in determining the limits of criminal liability is a common subject of criticism among criminal lawyers (see, for example Williams, 1993; Arlidge and Parry, 1996), but it is not exclusive to it. Recent revisions to the offence of theft (see, in particular, *Gomez*, 1993) have also served to place a huge emphasis on the concept of dishonesty in determining criminal liability. The significance of this is that dishonesty has no precise or particularised legal definition.[15] The law does not declare in advance what conduct is and what is not dishonest, rather it is left to the jury or magistrates to determine according to the standards of ordinary reasonable people (*Feely*, 1973). The test of dishonesty set out in *Ghosh* (1982) requires the trial judge to ask the jury whether first the defendant's conduct was dishonest according to the standards of reasonable and honest people and second, if his or her conduct was dishonest by those standards, whether the defendant must have realised that his or her conduct was dishonest by those standards.[16] The effect of this is that the only class of defendant[17] to whom the second limb of *Ghosh* is likely to be relevant is the professional or business person who asserts that his activities are acceptable in the circles in which he moves and that if people outside of his or her circle disagree it is because they are ill-informed (see, for example, *R v Seelig and Spens*, 1992).

This is not to say that the defendant can simply appeal to the standards of his immediate business associates. In the context of fraudulent trading at civil law Justice Maugham laid down the requirement of 'actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame' (*Re Patrick & Lyon Ltd.*, 1933). But as Levi has pointed out, the criminal standard of dishonesty is different (Levi, 1987: 208-209).

There is no special standard of dishonesty for commercial cases (*Lockwood*, 1986). It is not a defence that business people would think that the defendants actions were acceptable, only that the defendant thought that reasonable and honest people would.

This insistence on a standard of dishonesty common to all defendants appears to reinforce the broad scope of offences used to prosecute commercial fraud. Some writers, however, have argued that the courts' rejection of a discrete restriction on dishonesty for the professional still leaves in place a substantial limitation on dishonesty in cases involving commercial fraud. Levi has suggested, for instance, that a literal application of the *Ghosh* test to more novel commercial frauds cannot be analytically sustained. This, he argues, is because a business defendant is not in a position to realise what reasonable and honest people would think about forms of actions about which they have no prior knowledge (Levi, 1993: 224). A similar criticism, albeit in relation to the first limb of the *Ghosh* test, has been made by Griew who argues that:

> 'It is neither reasonable nor rational to expect ordinary people to judge as 'dishonest' or 'not dishonest' conduct of which, for want of relevant experience, they cannot appreciate the contextual flavour.' (Griew, 1985: 345)

According to Griew, where ordinary people[18] have either no experience or an insufficient understanding of the conduct under consideration, as might arise in cases 'involving intricate financial activities or dealings in a specialised market', the jury ought to conclude that 'ordinary people have no standards in relation to the conduct in question.' Any other answer, in his view, would be to misapply the test, especially if the jury were to 'take their cue' from the mere 'fact of prosecution' or 'from the evidence of witnesses who do understand the context' since they would not be asking themselves whether the conduct was dishonest according to the standards of ordinary people (Griew, 1985: 345-346). Thus, Griew, albeit for different reasons, shares Levi's view of criminal dishonesty as a conservative concept which, theoretically at least, is defined to exclude both the novel and the obscure. On closer inspection, however, this view only holds if dishonesty is regarded as an indissoluble concept and we ignore how it is constructed in real cases of commercial fraud. Before looking at this let us just examine Griew's criticism of dishonesty in the context of novel cases of commercial fraud.

The major flaw in Griew's criticisms of the application of the *Ghosh* test to cases involving commercial fraud, is that, if the proper application of the test is to reify it, then it is no more 'rational' whether we apply it to the more familiar surroundings of the supermarket or to an esoteric business environment. As Griew himself acknowledges the *Ghosh* test implies a 'relevant community norm', a highly contentious proposition, he claims, given the heterogeneity of modern society. Thus he tells us:

> 'It is simply naive to suppose - surely no one does suppose - that there is, in respect of the dishonesty question, any such single thing as 'the standards of ordinary decent people.' (Griew, 1985: 344)

The *Ghosh* test seeks to circumvent this problem, by requiring jurors to reject the values of any subculture that they might subscribe to and instead apply the dominant standards of the community (as opposed to any community norm). Thus, if a juror subscribes to a subculture in which shop-lifting attaches no moral obloquy, the test, if applied strictly, requires her to reject those values and instead apply the standards of 'ordinary people' who, the courts assume, would regard shop-lifting under such circumstances as dishonest. The problem arises when we seek to account for the existence of a subcultural value system alongside the dominant value-system of society. Dishonesty has no ontological reality, rather it is constructed. And one of the key dimensions of that construction is the process of police investigation and criminal prosecution which at once draws its legitimacy from and reinforces the dominant values of dishonesty. So, in a sense, even in cases involving shop-lifting, a juror, when assessing whether the conduct under consideration is dishonest, is taking 'their cue from the fact of prosecution' albeit other prosecutions and not only the one which he or she is determining.

A more significant problem with both Levi and Griew's observations is that both tend to ignore how facts are constructed to prove dishonesty within real commercial fraud trials. If we focus on the second limb of the *Ghosh* test, in respect of which Griew's arguments are equally relevant, the prosecution does not seek to prove dishonesty by obtaining direct evidence of the defendant's realisation that reasonable and honest people thought what he or she was doing was dishonest. Rather what the prosecution seek to do is elicit evidence which demonstrates a pattern of behaviour which corresponds to that which signifies more familiar cases of dishonest conduct. Although judges might disapprove of the prosecution's

attempt to draw direct analogies between the case before the jury and more routine cases involving similar offences (see, for example, *R v Peter Clowes*, 1992), it is still able to prove, and in fact does attempt to prove that the defendant has been secret beyond what is expected in the normal course of business (see, for example, *R v Seelig and Spens*, 1992), or that he or she has told half-truths (see, for example, *R v County Natwest and others*, 1992), or even out-right lies (*R v Peter Clowes and others*, 1992).

Thus, for the business defendant the scope of criminal liability marked out by offences such as conspiracy to defraud and theft is as broad and ill-defined as it is for an ordinary defendant. Not only is the criminal law, with its tendency to reinvent itself and to rely heavily for its definition on vague and open-ended concepts such as dishonesty unresolved, but its scope is also extremely wide. As such, the notion of criminal violation clearly fails to afford any insight into the radically diverse and open-ended phenomena which fraud both circumscribes and is used to describe.

The same is true, albeit to a lesser extent, of commercial fraud. Although it might convey the idea of property offences which relate to the commercial form, or as Leigh has put it 'those manifestations of fraud which involve abuses of the forms, facilities and institutions of commerce' (Leigh, 1982: 8), its sheer breadth serves at once to fuse and confuse the considerable variety of social and property relations that it is commonly understood to encompass. A company or partnership may be the victim of a fraud or it may be the vehicle of a fraud or it may be both. It may have been created for a fraudulent purpose (see Levi, 1981), or adapted to that end (see Leigh, 1982: 15-69). It may involve small or large companies. The variables are extensive. When it is said that the reforms were introduced to enhance the prosecution of commercial fraud, does this mean that they were intended to be mobilised against all forms of commercial fraud, including forms of commercial fraud that hitherto had not been prosecuted, or only some of them? If it is the latter then what distinguished those cases that would, under the new regime, be processed by the state's criminal justice apparatus, other than the fact they were perceived to be in violation of the criminal law? To what extent, in other words, were the reforms designed to enhance the prosecution of commercial fraud and, as such, promote the role of criminal justice as a medium of commercial regulation?

To truly understand the origins, intended effects and extent of the reforms, it is therefore necessary to go well beyond the technical requirement of commercial fraud control and focus on the social, economic and political determinants which first inspired and then sustained the selection of criminal justice as a more central medium of commercial regulation. Only then will it become apparent what types of commercial fraud were the intended object of the reforms, and why the criminal justice process was mobilised as a response to them.

To this end, it is important to recognise that the reforms did not constitute a unitary programme. There was neither an original design from which they took their shape, nor were they inspired by precisely the same series of events and pressures. In fact, they emerged from two separate inquiries into the prosecution of commercial fraud - the Jardine Working Party, which led to the formation of *ad hoc* Fraud Investigation Groups, and the Fraud Trials Committee, which devised the concept of the SFO. Each of these reviews was inspired by different events and developments and preoccupied with different priorities. Thus, to understand the dynamics of the reform process necessarily demands that the social, economic and political inspiration and the priorities of each of these reviews are considered separately.

THE JARDINE WORKING PARTY

The report of the Jardine Working Party produced in 1979 signalled the first major step since the creation of the Metropolitan and City Police Company Fraud Department (MCPCFD) in 1946, to reform the apparatus of commercial fraud prosecution in England and Wales (Home Office, 1985). The Working Party[19] itself had been set up in 1978 at the request of the Home Secretary by Sam Silkin, the then Attorney General, with instructions to examine what immediate measures could be taken within the existing legal framework to improve the effectiveness of the procedures governing the investigation and prosecution of commercial fraud and to consider whether there was a need for radical change or, alternatively, whether an entirely new system was required.

COMMERCIAL FRAUD: A CAUSE FOR CONCERN

According to John Wood (a member of the Working Party and first Director of the Serious Fraud Office) it had primarily been set up in response to two developments. The first concerned the general rise in commercial fraud recorded by the police. Although recorded commercial fraud is dependant on a number of variables (for a general discussion see Levi, 1981: 163-164; and 1987: 118-182), Wood's views on the subject are particularly interesting, not least because they correspond with some of the major concerns and key recommendations of the Working Party. He claimed that the apparent rise in commercial fraud was not a function of a simple increase in the actual amount committed, nor a result of an increase in the amount reported, but rather a consequence of the way that it was being defined by the police. The police, in his view, had traditionally tended to define commercial fraud as a civil rather than a criminal matter, but in the late 1960s and early 1970s had become far more inclined to treat commercial fraud more seriously and define it as criminal.[20] Although no direct evidence exists to account for why the police had begun to take commercial fraud more seriously and articulate certain forms of commercial behaviour as a criminal rather than a civil phenomena, Michael Levi's study on long-firm fraud[21] provides an interesting insight into one of the major reasons why it might have occurred.

Levi observed that in the early 1960s, professional fraudsters, working under the aegis of the Kray or Richardson brothers, had begun to undertake a series of large-scale long-firm frauds which were to provide the financial base upon which the gangsters' respective criminal empires were constructed. According to Levi, the profits from the crime were being used to pay their gang members and to gain a monopoly on extortion and on criminal activity in general. This gave rise to concern within the police that professional criminals and gangsters were profiting from fraud in general, and long-firm fraud in particular, and that to a large extent had derived much of their power from the crime. This led to a number of police officers being deputed to specialise in long-firm fraud within the MCPCFD; a process which culminated in 1971 with the formation of a permanent long-firm fraud section within the Department (Levi, 1981: 54-84 and 167). Thus, in the context of long-firm fraud at least - which had begun to consume an increasingly significant proportion of the resources that the police devoted to commercial fraud - the police had begun to regard commercial fraud with increasing concern not because of an appreciation of the seriousness of the phenomena itself, but because of its symbiotic relation to conventional crime which signified a more direct threat to the social order.

The second development that gave rise to the formation of the Working Party related to the impact that major, atypical frauds of 'substantial public importance and interest' were having on the resources which the police, and the Director of Public Prosecutions' (DPP) Office in particular, were able to devote to the routine investigation and prosecution of commercial fraud. There was a growing concern within the DPP's Office that increasingly complex and high profile cases of commercial fraud were beginning to seriously affect its ability to advise the police with their investigations and to eventually co-ordinate their prosecution. The Poulson case, involving corruption in local government, was acknowledged as having been especially draining on the resources devoted to commercial fraud prosecution within the DPP's Office. At its height an Assistant Director, a Senior Legal Assistant and a Legal Assistant had worked full-time on the case. This constituted a third of the entire Fraud Division (Jardine Working Party, 1979). What is interesting here, however, is not the limited resources available within the DPP's Office for the prosecution of commercial fraud (although this gives a strong sense of the lack of seriousness the DPP's Office and Government attached to commercial fraud), but that the primary concern was not the prosecution of large cases of commercial fraud itself, but the impact that it was having on the routine prosecution of commercial fraud. The original inspiration of the reforms, as such, centred on maintaining the routine prosecution of commercial fraud - which, as we shall see, generally involved a narrowly defined socio-economic type of case - rather than large cases of commercial fraud.[22]

The following analysis aims first to illustrate how the institutional edifice that sustained the investigation and prosecution of commercial fraud at the time of the Jardine Working Party operated to restrict the prosecution and conviction of commercial behaviour to a socio-economically distinct class of commercial fraud. It is not intended to provide a complete account of the whole range of forces that operated to define the contours of commercial criminalisation. It does not, for instance, provide a detailed examination of the range of filtering processes that served to select the type of cases that eventually came to be reported to the police and Department of Trade. This is not to deny the importance of these, and other factors, in explaining the particular socio-economic complexion of commercial criminalisation during this period. It is simply that these questions lie outside the scope of this particular enquiry. Here we are primarily concerned with the intended objectives of the Working Party. To examine, in other words, the extent to which the exercise was designed to extend the ambit of criminal justice intervention.

At the time the Working Party produced its report, the responsibility for investigating commercial fraud was primarily shared between the Department of Trade and the various specialist fraud departments within the police.[23] Although specific investigations commonly required the involvement of both the police and the Department of Trade, each organisation was nevertheless characterised by distinctly different organisational imperatives. These were ultimately based upon a shared institutional distinction between illegitimate and legitimate capital, or more specifically between fraudulent criminals and fraudulent businessmen, and fraudulent enterprises and 'otherwise' legitimate commercial concerns which had been operated fraudulently. These distinctions, operating through organisational practices, produced a sharp distinction in the type of cases that each organisation typically accepted for investigation. The police commonly only initiated inquiries into fraudulent criminals, leaving the responsibility for investigating fraudulent businessmen to the Department of Trade (Jardine Working Party, 1979). The importance of this institutional distinction in shaping the socio-economic complexion of the cases that were eventually prosecuted and convicted in the criminal courts was paramount. This was because whether an investigation was originally undertaken by the police or the Department of Trade was crucial to determining which cases were investigated with a view to a criminal prosecution, which were ultimately accepted for prosecution, and which were likely to result in a conviction.

THE POLICE

The investigation of commercial fraud was not, and never had been a high priority of the police. John Wood once remarked for example, that the police tended to 'view [commercial] fraud as a very low profile crime' and were highly resistant to the view that 'there was just as valuable a public service in sifting through the pages of a fraudulent company to obtain evidence of crime as there was in arresting a bank robber' (Wood cited in *The Guardian*, 1986). Although Wood's comments were mainly directed at individual police officers, it seems that the tendency to subordinate commercial fraud to crimes that more directly signified a threat to the social order was as true of the police as an organisation as it was of individual police officers, and that this particular ordering of priorities persisted both during and beyond the 1970s when the police had appeared to regard commercial fraud more seriously. Thus, in the wake of the inner-city riots in the early 1980s, Kenneth Newman instituted a policy of relocating police officers from specialist departments, such as the

MCPCFD, to divisional street crime and burglary. This had the effect of reducing the number of police officers serving in the MCPCFD from two hundred and nine in 1981 to one hundred and ninety by 1983 - a fall of just over 9 per cent (Levi, 1987: 138; House of Commons, 1986a: col. 511w).[24]

Yet, although the police accorded commercial fraud a low priority - a fact that was bound to have a significant impact on the resources that were made available for its investigation - the crime was still investigated. The MCPCFD, for example, existed solely to investigate commercial fraud and, in 1978, it had four hundred and seventy three cases under investigation (Jardine Working Party, 1979; also see Leigh, 1982: 226). This, however, provides no insight into the general socio-economic complexion of the cases that were investigated. The question remains. Was the operation of the MCPCFD oriented to all forms of commercial fraud or did it only tend to undertake investigations into illegitimate as opposed to 'otherwise' legitimate capital? The latter interpretations appears more accurate. The role that the police assumed in the investigation of commercial fraud was not so much a reflection of a deep-seated operational commitment to controlling the general criminality of commercial concerns, as it was an extension of one of its more traditional objectives - to police the activities of 'ordinary' professional criminals. The report of the Working Party, for instance, records that the police were essentially 'concerned with criminals who engage[d] in fraud', and that their primary function was to investigate companies that were 'wholly criminal from the outset', with a view to bringing charges under the general criminal law (Jardine Working Party, 1979). Although the report did not specify the precise criteria that were employed to distinguish between criminals who committed frauds in a commercial setting from 'otherwise' legitimate businessmen who committed frauds through formerly legitimate companies (or other commercial concerns), it is reasonable to suppose that the notion of the criminal, as opposed to the fraudulent businessman, was being used to describe four particular types of fraudulent individual.

First, those who repeatedly committed commercial frauds, but who confined their criminal actions exclusively to the commercial realm, such as the 'career' long-firm fraudster. Second, 'ordinary' criminals who were known to the police for their involvement in the more traditional forms of criminal enterprise, such as drugs, robbery and extortion, but who had diversified their operations into the commercial world. Third, individuals who had no known prior criminal history, but who were working in conjunction with either known

criminals or career fraudsters. And finally, individuals with no previous criminal history and no known criminal contacts, who were ostensibly involved in legitimate business and commerce but whose actions had, in fact, never borne a relation to legitimate business. Levi's study confirms that this distinction between criminals and businessmen was, in the case of long-firm fraud at least, institutionalised at an operational level and provides valuable evidence to the effect that even when the police did suspect fraud by 'otherwise' legitimate businessmen their limited resources deterred them from charging the suspect. He quoted one police officer as saying:

> 'These 'slippery-slope frauds'[25] you talk about. They are more cases of fraudulent trading than proper l.f.s. The people who run them aren't really villains - they're mainly people who do stupid things when they get into a sticky financial situation...they're not proper villains...You won't find this in the rule book, but in practice, almost everybody is given one chance...If we nicked everybody we thought might have done an l.f., we'd never finish our paperwork, the cases might never come to court, and if they did, they'd never have the room to try them' (Levi, 1981: 179).

There was, in short, a presumption within the police against mounting investigations into individuals who were suspected of committing frauds but who were not regarded as either conventional criminals, career fraudsters, individuals working in conjunction with people known to the police, or criminal fraudsters. The significance of this to the socio-economic complexion of the cases prosecuted and convicted in the criminal courts will become apparent as the discussion progresses. However, for the moment it is important to focus on the major concerns of the Working Party and discuss the legal powers that the police had at their disposal to investigate the type of frauds that typically came within its brief.

The Powers of the Police

The importance of gaining access to documentary evidence concerning the operation of a fraudulent company or business is crucial to the process of incrimination. As a former Treasury Counsel asserted in his evidence to the Fraud Trials Committee: 'It is hard for a fraudster to avoid incriminating himself by his records' (Worsley, 1985). However, other than what the Working Party described as the 'very limited powers' given by section 441 of the Companies Act 1948 and section 7 of the Bankers Book Evidence Act 1879, the police

had no additional powers to investigate commercial fraud over-and-above those that were available to them in the investigation of crime in general. Although it has been forcefully argued that the relationship between legal rules and police behaviour is generally indirect and contingent (McBarnett, 1981; McConville, *et al*, 1991), the limitations of section 441 were regarded by the Working Party, and the police in particular, as acutely constraining. Applications under section 441 (which enabled the police to apply to a High Court Judge[26] by way of summons for an order authorising the production of a company's documents) were rarely made by the police as they invariably produced substantial delays to the investigation.[27] The delay specifically arose from the need to obtain Counsel's opinion and to prepare legal submissions to show that there was reasonable cause to believe that any person, whilst an officer of the company, had committed an offence in connection with the management of the company's affairs and that evidence was to be found in the company's books and papers (Jardine Working Party, 1979: 29; Director of Public Prosecutions, 1985: 9). Moreover, according to Levi, where applications were made, in the context of long-firm fraud at least, the judiciary were rarely prepared to grant an order (Levi, 1981: 182). The police's perception of the investigative value of section 441, within the context of long-firm fraud, was summed up by one police officer who claimed that:

> 'As far as we are concerned section 441 might as well not exist on the Statute Book' (cited in Levi, 1981: 183).

Section 7 of the Bankers Book Evidence Act 1879 was, according to the Working Party, of even less value to the police. Although it empowered them to apply to a Magistrates' Court or to a judge to inspect and take copies of entries in a banker's book for any purpose connected to their investigation, the power only arose after legal proceedings had been instituted (that is where the suspect had been charged) and, in addition, the suspect was commonly notified of the application.

The Working Party concluded that the limitations of section 441 and section 7 and the general lack of police powers to search and seize evidence placed severe restraints on the police to acquire evidence before it was removed or destroyed; the right effectively being denied to them unless they had the co-operation of the company itself or had arrested its officers. What is of major interest, however, is not that the law offered significant protection from incrimination, although this is important, but why the Working Party regarded it as a

problem. To this effect, their major concern was that the legal restraints on the police were being 'exploited to the full by criminals experienced in the world of fraud, whether they operate[d] as individuals or behind the cloak of a limited company' (Jardine Working Party, 1979). Thus, in this respect, the major preoccupation of the Working Party was that criminal fraudsters were being granted immunity from unilateral police intrusion.

The fact that the investigative powers available to the police were constraining even within the limited goals that they set themselves, led them to rely heavily on the Department of Trade and the far more intrusive powers available to it under section 109(1) of the Companies Act 1967. These are considered below.

THE DEPARTMENT OF TRADE

As part of its general responsibility for regulating corporate conduct the Department of Trade also had a miscellany of powers at its disposal to investigate companies which could be used to unearth evidence which would ultimately sustain a prosecution.[28] These powers were of far greater significance to the prosecution of 'otherwise' legitimate companies than the powers available to the police. There were two reasons for this. First, because unlike the limited powers available to the police, the Department of Trade's powers were far more coercive. And second, because the Department of Trade was an institution which, unlike the police, was not organisationally oriented to the investigation of criminals or wholly fraudulent companies. Department of Trade investigations undertaken on its own initiative,[29] in other words, were far more likely to be directed towards previously legitimate companies. As we shall see, however, the potential of these powers to realise the prosecution of 'otherwise' legitimate companies was rarely, if ever, fully realised.

Section 109 of the Companies Act 1967

The chief powers vested in the Department were granted by section 109(1) of the Companies Act 1967 and section 165 of the Companies Act 1948. The first of these, section 109, empowered the Department to direct a company to produce its books and papers and, where necessary, to require any of its past or present officers to provide an explanation of them (see Levi, 1981: 183-4; and Leigh, 1982: 166).[30] The provision had originally been introduced to serve as a preliminary investigative tool to complement the other major power

at the Department's disposal, granted by section 165, which enabled a far more extensive and comprehensive investigation to be undertaken. To this effect it empowered the Department[31] to undertake a discreet preliminary investigation; enabling a decision to be made about whether a full investigation was warranted without generating the publicity that invariably followed the appointment of inspectors under section 165.

Section 109 investigations were not, however, restricted to this function. The terms of the provision were far more extensive. Amongst other things, a section 109 inquiry could be used for the purpose of enabling the Department to exercise its powers under companies and insurance legislation, in aid of civil proceedings brought under section 37 of the Companies Act 1967, or with a view to wind-up a company, or to enable the Bank of England to discharge its functions under the Banking Act 1979 (Leigh, 1982: 166). With respect to criminal proceedings section 109 had three principal uses. First, it authorised the Department to use any information acquired from an inquiry to undertake an immediate prosecution. Second, it permitted the Department to pass the results of an inquiry undertaken on its own initiative onto the criminal authorities. And finally, it allowed the Department to undertake an inquiry in response to a request for assistance from either the police or the DPP. Thus, as well as a preliminary measure to a full inspection, a section 109 investigation could also be used a means of expediting either a current or imminent criminal investigation.[32]

The few academics who have considered the provision have, to varying degrees, tended to ignore the full range of uses to which section 109 investigations could be put. In *The Control of Commercial Fraud*, for example, Leonard Leigh only lists the full range of ends to which section 109 could be employed; giving the impression that the facilitation of the full power of investigation (which is discussed in greater depth) was by far the most significant effect of the preliminary power of inspection (Leigh, 1982: 173 and 233). To emphasise the use of section 109 in this way is, however, to confuse the reason why the power was introduced with how it was used in practice. Although the precise extent to which the full power of inspection was facilitated by the introduction of the preliminary power of inquiry is difficult to evaluate, the statistics produced by the Department of Trade's Annual Reports suggest that its impact in this respect was minimal. On average, only four section 165 inquiries *per annum* began with a section 109 inquiry between 1967, the year the provision took effect, and 1978.[33] This was not in any way a result of the

Department's reluctance to use the provision. On the contrary, over the same twelve year period, one thousand and fifty nine section 109 inquiries were undertaken; nearly six times the total number of section 165(b) investigations and well over twenty times the number that originated in a preliminary inquiry.[34] Leigh suggests that one reason for the considerable difference between the use of each power was that in most cases the mere institution of a preliminary inquiry was sufficient 'to cause the company to put its affairs in order' (Leigh, 1982: 173).[35] There is no conclusive evidence either way to suggest whether this occurred or whether it, in part, accounts for the disproportionately greater number of section 109 inquiries to section 165 investigations. What evidence that does exist, however, suggests that it was not the only reason. Although Leigh notes that (before 1981 when information obtained during the course of section 109 was made generally available to the police) the Department of Trade's view was that section 111 of the 1967 Act precluded them from releasing information to the police before proceedings had commenced, section 109 was still frequently used to support criminal investigations (see Leigh, 1982: 178; Rider and Hew, 1977). By the early 1980's this appeared to be the exclusive purpose of 109 inquiries. According to the DPP's written evidence to the Fraud Trials Committee, for instance, the major reason for the difference in the use of the two powers was that the Department was more disposed to using the provision to support the police and DPP's investigations, rather than as a means of investigating complaints with a view to initiating an inspection under 165. This, he claimed, was because in practice, staff limitations at the CIB tended to heavily restrict the number of section 109 inquiries it could undertake and, as a result, they were generally only made at the request of either the police or the DPP (Director of Public Prosecutions, 1984).

This would suggest that the power was rarely used as a means of initiating investigations into 'otherwise' legitimate companies with a view to eventual prosecution. Moreover, where the Department used the power on its own initiative to investigate 'otherwise' legitimate companies it would seem that either the Department were reluctant to forward the results onto the police or would generally only use it as an exploratory device to aid the decision on whether to undertake a section 165 investigation, and even in this respect it only gave rise to a small number of section 165 investigations. Section 109 inquiries, in short, appeared to be rarely used as an instrument to initiate criminal prosecutions into 'otherwise' legitimate companies.

Section 165 of the Companies Act 1948

Consequently, the singular most important power used to investigate 'otherwise' legitimate companies which might produce a criminal prosecution was that granted by section 165(b) of the Companies Act 1948.[36] This provision authorised the Secretary of State for the Department of Trade to appoint inspectors, customarily a Queen's Counsel and an accountant appointed from outside the Department,[37] to mount a full investigation into the management of limited companies. Under the provision inspectors were granted wide powers to require the production of a company's documents and records, and to question its officers and agents - the transcripts of which could be used as evidence in Court.

Although investigations under section 165 constituted the most intrusive power that the authorities had at their disposal to investigate commercial fraud, the grounds upon which the power was made available to the Secretary of State were not restricted to the investigation of commercial fraud committed by 'otherwise' legitimate companies nor, for that matter, to commercial fraud itself. The power was also exercisable where the 'circumstances suggested' that a company had been formed for a fraudulent purpose, or where the promoters or managers of a company had been guilty of misfeasance or other misconduct towards the company or its members, or where the members of a company had not been given all the information with respect to its affairs which they might reasonably expect (see Leigh, 1982: 169; and the Company Law Committee, 1962: 79). Thus, section 165 investigations could be put to a number of ends other than simply the investigation of commercial fraud.

One of the purposes of these other ends was to support the administration of the practitioner-based regulatory apparatus of business and commerce. As the Working Party put it, the other ends were pursued with a view to alerting the Secretary of State to the way the company under investigation was being conducted and ultimately 'to provide information to the Stock Exchange and to the professional bodies about the conduct of [their] members' (Jardine Working Party, 1979). The pursuit of these other administrative objectives through the mechanism of the full power of investigation was as old as the power itself, the first reported case of which had been in the latter part of the nineteenth century (Hadden, 1977: 352). In fact prior to the introduction of section 165 of the Companies Act 1948, the full power of investigation was primarily a vehicle of private redress for

shareholders. It could only be exercised on the petition of shareholders, and its primary purpose was to obtain information on their behalf with a view to assisting their control of management. Section 165 was, it seems, designed to shift the emphasis of the power away from its use as a form of private redress to a form of state intervention. Thus, the new power gave the Board of Trade the capacity to order an investigation on its own initiative; a feature which gave effect to the view of the members of the Company Law Committee of 1943-4 that the existing provision was resistive to the prosecution of fraud and required reform to make it a more useful stimulus to prosecution (Leigh, 1982: 165).

Notwithstanding the existence of the other administrative objectives of section 165 investigations, in keeping with the changes made to the power in the 1948 Act, the public pronouncements of the Department generally tended to stress the discovery of fraud as one of the major, if not the major function of section 165 investigations (see, for example, Department of Trade, 1979: 1; and Rider and Hew; 1977: 149). If this, however, had served to give the impression that the state had put a premium on facilitating the process of criminal justice intervention against the companies that were subjected to the provision, then it was a fantastic illusion. Although section 165 investigations had immense inherent potential to unearth evidence of commercial fraud, according to the observations made of the power in the Working Party's report, it seems that, in practice, they served as much to inhibit the process of criminal justice intervention as they did to realise it.

As with the powers that had preceded it, section 165 had not primarily been conceived as a device to facilitate criminal justice intervention; having been initially established to provide information for shareholders (Jardine Working Party; 1979). The power was rarely exercised prior to the introduction of section 109 of the 1967 Act (Rider and Hew, 1977: 146). According to Leigh, this was because the Department insisted on a very high standard of proof before it would act so as not to unduly damage a company through adverse publicity (Leigh, 1982: 170-1; see also Rider and Hew, 1977: 145). Leigh's observation was based upon the evidence given to the Company Law Committee which reported in 1962. A closer examination of the Committee's report, however, tends to suggest that the Department's fear of inflicting unwarranted adverse publicity on a company was not the only reason it failed to act. The Committee found that the Department not only generally refused to act on complaints without considerable evidence to substantiate the allegations made, but also where considerable evidence to justify an investigation did exist; in which

case it tended to advise applicants to pursue their complaints through the courts (Company Law Committee, 1962; see also Leigh, 1982: 170-1). Too little evidence and the complainant was sent away, too much and the complainant was sent elsewhere. As such, it seems that the Department's efforts to protect companies from the intrusion represented by a section 165 investigation was either as much a result of its preference for civil remedies, over administrative or criminal justice solutions or, alternatively, a reflection of the Department's view that all adverse publicity was unwelcome even where there were genuine grounds for a complaint.

According to Leigh the rise in the number of section 165 investigations after 1967 was testimony to the effect of section 109. It is difficult to see, however, how the rise in section 165 investigations can be attributed solely to the introduction of the power to initiate a preliminary inquiry. Whilst the average number of appointments under section 165 increased nearly twofold after 1967, only half of the increase can be directly accounted for by the introduction of section 109 (Department of Trade, 1966; 1967). More significantly, however, the rise in the number of section 165 investigations did not realise a corresponding increase in criminal justice intervention. Even by the 1970's, when the power was called upon more frequently, the power was still neither designed, regarded within the Department, nor primarily employed as an instrument to assist the process of criminal justice intervention. The Department, for its part, was reluctant to intervene to tailor its operation to the needs of the criminal process. When the DPP criticised the delay commonly taken to inform the police (or DPP) of criminal offences which had been discovered in the course of a section 165 investigation, for example, the Department of Trade made the point that the function of inspectors was not always appreciated.[38]

According to the Working Party's report, the pronounced tendency within the Department to subordinate criminal justice intervention to the other administrative objectives of section 165 investigations operated through organisational practices to shape the operational priorities of the inspectors. Thus, in its introduction to a discussion on section 165 investigations the Working Party stated that, '...the section 165 inspectors have very different aims from the police...The procedure...is not so much designed to show criminal offences as undesirable management or poor auditing systems' (Jardine Working Party, 1979). This is not to say that the style of management or the standard of a company's auditing systems were examined to the complete exclusion of suspected fraud or that the

power was never used as a means of facilitating criminal justice intervention. The Working Party's report did, for instance, stress that one of the objectives of inspectors was to look for 'criminal behaviour', and both criminal investigations and prosecution did follow from investigations under section 165.[39] It was simply that the administrative objectives of section 165 investigations regularly took priority over the instigation of criminal justice intervention, and that the provision was tailored more to further the inspectors' administrative objectives rather than to the demands of criminal justice intervention. The power, in short, was both primarily designed and used to supplement and aid the operation of the administrative apparatus of commercial regulation. More specifically, both the statutory requirements of the section and the operational priorities of the inspectors served, in the main, to extinguish the prospect of section 165 inquiries supporting criminal investigations that would ultimately found successful prosecutions.

There were several reasons why section 165 investigations were not enabling of criminal justice intervention. Firstly, the appointment of Inspectors were invariably published and in the case of private limited companies appointments 'quickly came to the notice of the public'.[40] This, in the view of the Working Party, gave the officers of the company under investigation the opportunity to both conceal evidence that tended to incriminate them and 'to take steps to protect themselves [from prosecution]' (Jardine Working Party, 1979; see also Director of Public Prosecutions, 1984). Thus, from the very moment a section 165 investigation was undertaken, the form that it took appeared not so much to be shaped by the imperatives of criminal justice intervention, which required stealth and secrecy, but by its administrative objectives; serving to minimise the prospect of incriminating evidence being uncovered.

This characteristic was reflected throughout the conduct of investigations. Hence, although section 41 of the 1967 Act granted inspectors the power to inform the Department of Trade (which would then take the decision to refer the matter onto the criminal authorities) if they suspected that their enquiries had uncovered suspected criminal offences, they were 'often reluctant to do so for fear of prejudicing the assistance they [were] receiving from officers and members of the company....' (Director of Public Prosecutions, 1984). The overall result, according to the Working Party was that, since the inspectors had 'all the powers of investigation' the police were sometimes 'not involved until long after the appointment of

the inspectors, by which time any offences [were] very stale and memories [had] faded' (Jardine Working Party, 1979).[41]

Even when an investigation had been referred to the criminal authorities and a section 165 investigation was being carried out concurrently with a police enquiry, the police enquiry could rarely advance. Inspectors were notoriously 'reluctant to co-operate' or, at the very least, tended to 'request the Police not to interview a particular person for fear of prejudicing their inspection' (Director of Public Prosecutions, 1985). According to the Working Party, even when inspectors broke with convention - deciding not 'to keep their interviews with witnesses before the police question[ed] them' - and the police were able to see the transcripts of the evidence given to inspectors they 'often' could 'make little sense of them because they are taken over a period of months and in no discernible order' (Jardine Working Party, 1979). In other words, where full co-operation was forthcoming, further delays were almost inevitable since it was rare for section 165 investigations to have been conducted with a view to the demands of a subsequent criminal investigation. When inspectors interviewed witnesses, for example, they would neither chronologically order the transcripts of the interviews nor identify the documents which were referred to in the interview. This tended to cause substantial delays to any future criminal investigation, for when the police - who were ultimately responsible for amassing and ordering evidence for a prosecution - came to examine the transcripts of interviews, they were not only unable to 'make sense of them because they [were] taken over a period of months and in no discernible order', but were also obliged to spend weeks 'marrying up the evidence with documents' (Jardine Working Party, 1979).

The sum effect of all this was that the police and therefore commercial fraud prosecution were routinely denied the benefits which the Department of Trade's more intrusive powers promised. Section 165 inspectors routinely subordinated criminal justice intervention to the object of completing their investigation; causing considerable delays to the process of incrimination.[42] This, as we shall see, had a profound impact on the DPP's decision to prosecute.

The Consequences of the Existing Organisation of Section 165 Investigations

The investigation into Darjeeling Limited captures perfectly both the scale and consequences of the delay that commonly took place before an investigation had reached the stage when a decision to prosecute could be taken. The offences were committed in 1974. On April 30th 1975, the Department of Trade initiated an inquiry under section 109. The information obtained from the inquiry confirmed the Department's suspicions and, as a result, inspectors were appointed under section 165 to investigate the affairs of the company on July 22nd 1975. Although the inspectors began work immediately, nine months passed before they submitted a report (on May 19th 1976) to the Department of Trade under section 41 of the Companies Act 1967. This informed the Department of their suspicion that criminal offences had been committed and suggested that the police begin to make their own enquiries into the company. It was not until July 9th, however, before the Department formally notified the DPP of the substance of the inspectors' findings and passed over reports that had been made pursuant to section 109 and section 41. In July, the DPP informed the police that it was assuming responsibility for the case and that one of the inspectors, Peter Millet QC, had agreed to assist the criminal investigation and was prepared to be interviewed. Towards the end of 1976, on 3rd November, a conference between the DPP's lawyers and the police took place in which the police were advised on the lines of enquiry that they should pursue. Thereafter, work on the criminal investigation came to a virtual cessation whilst the police and the DPP awaited the results of the inspectors' investigation. Another year passed before the inspectors submitted a draft report to the Department of Trade (22nd November 1977), disclosing evidence of 'serious criminal offences' committed by individuals who, three years after having committed the offences, were now outside the jurisdiction. On March 20th 1978, the inspectors submitted their final report, a copy of which was supplied to the DPP the following month. On receipt of the report, the criminal investigation gathered pace once again. Between June 7th 1978 and September 28th 1979, lawyers from the DPP held three conferences with the police. On September 28th 1979, five years after the offences had been committed and well over four years after the Department of Trade had initiated its section 109 inquiry, the police finally submitted their last report to the lawyers working on the case in the DPP's Office.

Just over a month later on 5th November 1979, an Assistant Director took the decision not to initiate criminal proceedings. The major reason for this was that the prosecution would have involved a committal in 1980 and a trial by the middle of 1981, seven years after the offences had been committed. Furthermore, the two principal defendants were abroad, the

first being sick and elderly and the second having taken up residence in Andorra where there was little prospect of him being extradited. The remaining defendants were on the periphery of the fraud or had died during the course of the protracted investigations.[43]

Thus, even where the police and DPP were alerted to the suspected commission of criminal offences during the early stages of a section 165 investigation, the network of practices embraced by the organisations of commercial fraud investigation served to minimise the prospect of a prosecution.

THE RECOMMENDATIONS AND THE SIGNIFICANCE OF THE JARDINE WORKING PARTY

A constant theme of the report had been the need for greater resources to be made available to the Department of Trade, but especially the police, for the investigation of commercial fraud. The under-funding of these institutions, in part, accounts for why criminal justice had traditionally tended to operate at the margins of financial regulation: why, in other words, it was only able to sustain the prosecution of all but a small and unrepresentative sample of the cases that came to the attention of the authorities. The collective failure of the police, Department of Trade and DPP's Office to systematically apply criminal justice solutions to commercial crime was not, however, solely a product of under-funding. An equal impediment to successful criminal justice intervention was the organisational and legal structure of criminal justice itself.

Commercial fraud investigation was organised to limit its capacity to sustain criminal prosecutions on a routine basis. The laws that governed the production, preparation and presentation of evidence were not tailored to the realisation of prosecution. The organisation of commercial fraud control, in short, was co-ordinated to subvert as much as it was to facilitate criminal justice intervention. This was particularly acute in respect of the prosecution of 'otherwise' legitimate companies. As a result of the Department of Trade's reluctance to manage section 165 inquiries in a way that would expedite a criminal investigation, by far the most common source of criminal prosecutions were cases that had been investigated from the outset by the police. However, because the police largely tended to mount investigations into commercial fraud committed by criminals or 'career' fraudsters or through companies which were fraudulent from the outset, cases involving previously

legitimate companies rarely resulted in criminal prosecution. Thus, at the time the Working Party produced its report, the practical role of criminal law in controlling commercial trading was principally to exclude criminals from using the medium of the limited company as a vehicle for fraud.

Of equal significance, was that the report's recommendations were principally aimed at expediting this particular use of criminal justice. The primary concern of the Working Party, in other words, was not to expand the narrow role that criminal justice had traditionally played in the control of commercial fraud by ensuring the more frequent prosecution of commercial fraud committed through 'otherwise' legitimate companies. This is not to say that the report failed to make any recommendations to expedite the prosecution of 'otherwise' legitimate companies. In respect of section 165 investigations, it did, for instance, stress the 'need for the evidence to be kept in a tidier form and the witness transcripts to be more like statements taken by the police' and emphasised the importance of an exhibits officer who could 'cross-reference the transcripts of evidence' (Jardine Working Party, 1979). Significantly, new resources for these reforms were not made available,[44] not that the Working Party seemed unduly concerned about the state's inability to prosecute 'otherwise' legitimate companies. Its report recorded, for example, that:

> 'We consider that we have a good system which would be greatly improved with additional powers granted to the police and additional resources and manpower to both the police and the prosecuting lawyers.' (Jardine Working Party, 1979)

Rather its main concern was on meeting what it considered to be the most serious threat posed by commercial fraud; namely the growing trend of criminals using the facilities of commerce to commit crime.

> '...we wish to emphasise that in the majority of cases fraud is local, is criminal from the outset...It is for these reasons that the police require additional powers to fight an ever increasing and ever more sophisticated type of crime' (Jardine Working Party, 1979).

To transform criminal justice into a central medium of financial regulation would, however, not only have required a radical reorientation of organisational culture, it would also have required a fundamental revision of the organisational and legal structure of criminal justice

itself. Both of these requirements depended upon direct intervention from central Government and neither were addressed in the report. Central Government, for its part however, had conspicuously failed to directly intervene and adapt the process to the demands of financial regulation. What then was unique to the 1980's that motivated the state to cultivate criminal justice as a means of financial control? This question will principally be addressed in Chapter III, since it can only be fully answered after the establishment and original objectives of the Fraud Trials Committee is understood.

THE FRAUD TRIALS ('ROSKILL') COMMITTEE

THE CREATION OF *AD HOC* FRAUD INVESTIGATION GROUPS

Shortly after the Jardine Working Party completed its report Sir Michael Havers, the then Attorney-General, formed a small working group to examine its recommendations on co-operation between the police, Department of Trade and DPP's Office with a view to putting them into practice. Surprisingly, the working group's strategy to implement the proposals, presented to Havers in April 1980, gave rise to an informal pilot scheme of *ad hoc* fraud investigation groups (Fraud Trials Committee, 1986: 17; Home Office, 1984). These groups, put into operation on a case-by-case basis by the DPP with the co-operation of the police and Department of Trade, were essentially designed to expedite the investigation of commercial fraud with a view to limiting the number of cases which failed to reach trial because of unduly long and protracted investigations.[45] To this end, each group was designed to provide a relatively formal structure in which all the agencies involved in commercial fraud investigation could consult with one another at the outset of an investigation. It was anticipated that this early consultation would provide the basis of a more co-ordinated investigation which would only pursue those lines of enquiry most likely to produce a 'manageable' case, thereby circumventing the wasteful practice of parallel investigations by the police and Department of Trade which routinely involved extensive duplication of effort and delays in eliminating barren lines of enquiry (Home Office, 1984). The measure was surprising because, in the event, *ad hoc* fraud investigations were designated to more complex frauds, some of which involved 'otherwise' legitimate companies. A phenomena to which the Working Party had only attributed a low priority.

Although it is difficult to assess with any precision whether the fraud investigation group concept brought about an increase in the prosecution of commercial fraud committed through 'otherwise' legitimate commercial organisations, all the parties which participated in the project at least considered them to be an effective means of reducing the time taken to complete investigations. The MCPCFD estimated a reduction of about a third of the time taken to complete a conventional inquiry (Fraud Trials Committee, 1985: 18). This general satisfaction with the new arrangements provides another cause for surprise, because it seems to contradict the turn of events that followed. Even before the pilot scheme had run its course, the Government had already set in train a measure which, in the event, precipitated a far more radical transformation in the prosecution of the most serious and complex commercial frauds.

THE ESTABLISHMENT OF THE FRAUD TRIALS COMMITTEE

On 8 November 1983, only two years after the first fraud investigation group had been set up, the Lord Chancellor and the Home Secretary announced their intention to establish an independent committee of inquiry to consider what changes could be made to almost every aspect of the criminal justice process relating to the investigation, prosecution and trial of commercial fraud (House of Commons, 1983: cols. 83-84).[46] The Fraud Trials Committee, or Roskill Committee as it became known, represented the most significant development yet in the steady expansion of criminal justice intervention. Its recommendations made both the proposals contained in the Report of the Jardine Working Party and those which were put into effect look thoroughly conservative in comparison.

According to the DPP's written evidence to the Fraud Trials Committee, Havers had been anxious that 'the momentum generated by the Jardine report should not be lost' (DPP, 1984), but his efforts to preserve that momentum could, in view of the limited recommendations in the Report, only serve to confirm his caution. Of the Report's fourteen recommendations, only two really stand out as significant. The first, which was later enacted as sections 8 to 16 and Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE), was to allow the police (where there were reasonable grounds for suspecting fraud) 'to seize material evidence, including financial records of persons and organisations, before proceedings had begun' (Jardine Working Party, 1979: 44). These new powers, although containing restrictions in respect of material acquired or created in the course of

any trade, business, profession or other occupation,[47] nevertheless constituted a significant advance on the powers previously available to the police. More specifically, PACE removed arguably the most extravagant constraint on the police which, in effect, prevented them from taking possession of financial records until a person had been charged (see above[48]). Whether the police were able to take full advantage of them, however, is doubtful considering that, on all accounts, the investigation of fraud was still given a low priority within the force (see for example, Fraud Trials Committee, 1986: 34-35; Levi, 1987: 138). The second proposal which recommended minor changes to the organisation of commercial fraud investigation and prosecution - and was realised first in the shape of *ad hoc* fraud investigation groups and later with the institution of the fraud investigation group concept on a more permanent footing (hereafter described as FIG) - proved to be only marginally more significant in terms of empowering the DPP's Office to prosecute cases of commercial fraud committed through 'otherwise' legitimate companies.

The single most important reason for the failure of *ad hoc* fraud investigation groups to bring about an appreciable change in the prosecution of 'otherwise' legitimate companies was what Doirian Williams, a one time Controller of FIG, described as the 'reckless under-resourcing of FIG' (Williams, 1987). Despite the Jardine Report's call for more staff in the DPP's Office and Solicitor's Office to be allocated to the investigation and prosecution of fraud (Jardine Working Party, 1979: 44), no meaningful increase in resources was forthcoming. In a speech to a conference organised by the Institute of Chartered Accountants soon after retiring from the DPP's Office, Williams revealed that the fraud investigation group concept had suffered 'severe resource problems...since its inception' (Williams, 1987). Whilst it was only a pilot scheme operating in London, it certainly had little effect on the number of fraud cases investigated by the City of London police which were brought to trial. Thus, between 1981 and 1984, despite an increase from 80 to 117 cases under investigation, and a comparable rise in arrests from 35 to 77, the number of cases taken to trial in the Crown Court remained the same at 18 (House of Commons, 1985c: col. 434). What is even more striking, however, is that the lack of financial commitment to the concept continued throughout the 1980's, and beyond 2nd January 1985, when it was placed on a more formal basis.

This latter development might in itself have appeared to suggest a significant departure with the past; suggesting not just a general increase in the prosecution of commercial fraud, but

also a discrete increase in the prosecution of cases of commercial fraud which, hitherto, had routinely escaped prosecution. Especially given the frequency with which FIG was relied upon by Government Ministers when questioned about the Government's commitment to prosecuting fraud, its subsequent coverage in the news media,[49] its association with the Peter Cameron Webb syndicate scandal and the fact that it represented the first tangible realisation of the reforms advocated by the Jardine Working Party.[50] This was clearly the image which the Government wished to foster, Sir Michael Havers, the Attorney-General, announcing in the House of Commons, for instance, that:

> '...FIG has been a great success story. Indeed, it has been so successful that it is almost overwhelming' (House of Commons. 1986b: col. 768).

The ease with which FIG lent itself to this representation is readily appreciable. Although it was subsumed within the DPP's Office, its title - the Fraud Investigation Group - gave it a relatively distinctive identity. Nor did this merely seem to be a matter of presentation. FIG, or more precisely the institution of the fraud investigation group concept on a more permanent footing represented, to some extent at least, a substantive organisational change; involving the creation of another specialist Fraud Division within the DPP's Office in addition to the two which already existed. This re-organisation allowed one Division to deal with London 'FIG cases', another to investigate provincial 'FIG cases' and a third to deal with all the other frauds reported to the DPP (Levi, 1987: 177).[51] Each Division was headed by an Assistant Director of Public Prosecutions and initially contained four lawyers with a support staff of accountants, law clerks and secretaries, operating along similar lines to the *ad hoc* groups. As soon as either the police, the DTI or DPP, identified that a case required a FIG investigation, a representative of each of the organisations would meet to consider first whether that view was correct and second to allocate responsibility and generally draw up a strategy for the investigation. Thereafter this relatively structured setting would provide a forum in which the general direction of the investigation could be discussed and, if necessary, to facilitate an immediate inspection by the DTI under section 447[52] of the Companies Act 1985 so that the police investigation would not be delayed (Fraud Trials Committee, 1986: 20).

Moreover, the criteria setting out the type of cases which would acquire the label of a 'FIG case' - which included frauds discovered in the course of DTI investigations, frauds

committed by people connected with Lloyd's, the Stock Exchange and other Commercial Exchanges (Home Office, 1985) - also seemed to suggest that this more permanent arrangement would begin to see cases of commercial fraud committed through 'otherwise' legitimate companies prosecuted with increasing regularity. However, as Levi has observed, FIG was a 'more cosmetic than substantive' development (Levi, 1987: 177); suffering a chronic short-fall in resources right up until the enactment of the Criminal Justice Act 1987, the SFO's enabling legislation. Havers might have said that the success of FIG had been 'overwhelming', but in view of John Woods comments[53] that it could 'barely cope' with the volume of work, overwhelmed would have been a more accurate choice of word (House of Commons, 1985c: col. 447).

Thus, in 1985 no new staff were recruited to the Fraud Divisions of the DPP's Office, notwithstanding a near 50 *per cent* increase in the number of cases of fraud referred them on the previous year (Williams, 1987). This limit on recruitment remained in place even when the under-staffing of FIG had eventually become public knowledge,[54] forcing the Attorney General to announce to the House of Commons that FIG was to be given a 60 *per cent* increase in staff, including nine more lawyers (Levi, 1987: 177; Williams, 1987; House of Commons, 1986b: col. 766-67). In 1987, FIG faired little better, recruiting just three new lawyers and one extra law clerk, but not a single extra accountant (Williams, 1987). The constraints operating on FIG's capacity to expand the scope of criminal justice intervention is brought into even sharper focus by comparing its budget and staffing to its case-load. In 1986 FIG had nearly 600 cases referred to it - a massive amount in view of the fact that it had less than 60 staff (of which initially only 18 were professionals - Levi, 1987: 177) and an annual budget of around £1.5 million (Williams, 1987). FIG, in other words, seemed chronically under-resourced, especially when one considers that in the explanatory and financial memorandum to the Criminal Justice Bill it was anticipated that the SFO would require a budget of around £4 million *per annum* to investigate and prosecute about 50 to 100 cases with an estimated staff of 80.[55]

More important, however, in terms of FIG's impact on the prosecution of commercial fraud committed through 'otherwise' legitimate companies however, was the fact that many of its cases did not fall within the formal criteria of a 'FIG case'. Only 350 of the 600 cases referred to the Fraud Divisions with the DPP's Office had been reported because of their 'difficulty, importance and local sensitivity'. Of the remainder, 55 had, for instance, been

referred to FIG under section 165 of the Bankruptcy Act 1914, 100 more having been referred to it because of insufficient resources to deal with the cases locally (Williams, 1987). Even then not all of the 350 cases which had correctly been reported to the DPP's Office were designated as 'FIG cases'; Williams estimating that only 80 to 90 of the cases FIG had under investigation satisfied the FIG criteria (Williams, 1987).

This is not to deny that FIG had a real impact on the prosecution of commercial fraud. As we saw above, in a purely technical sense, the fraud investigation group concept was generally considered to have brought about a decrease in the time taken to investigate cases. This was crucial if the Fraud Divisions were to keep abreast of the steep rise in the volume of fraud cases referred to the DPP in the 1980's, which climbed from 408 in 1984 to 593 in 1984. And to some extent it seems to have managed the problem. Between 1984 and 1985, the number of cases committed for trial upon indictment increased from 45 to 93; between 1985 and 1986 the number of trials concluded, in which the Fraud Divisions were involved, increased from 55 to 86, accompanied by a parallel rise in convictions from 42 to 74. It is difficult to ascertain whether this increase in prosecutions managed by the Fraud Divisions included a parallel increase in the number of cases of commercial fraud committed through 'otherwise' legitimate companies; certainly not all of them were even 'FIG cases'. What is certain, however, is that it did include these types of cases, such as the Miller Carnegie case,[56] which although not reaching the jury (the defendants being acquitted on the direction of the trial judge) would have had a far smaller chance of reaching trial under the conventional arrangements for criminal investigation. Thus, FIG did not seem to be completely ineffective in prosecuting cases of commercial fraud committed through 'otherwise' legitimate companies. Nonetheless, in Williams's words, the Government's 'cynical determination to limit expenditure'[57] (Williams, 1987) undermined the claim that FIG represented a significant land-mark in criminal justice expansionism, reducing it to something which more closely resembled a Treasury led efficiency drive concerned with making better use of existing resources.[58]

The Fraud Trials Committee's recommendations, on the other hand, looked revolutionary in comparison. Not only because of their number - 144 compared with the 14 made in the Jardine Report - but also because of their breadth and substance. To this effect, the Committee's proposals involved changes to almost every aspect of criminal justice and included: the introduction of an administrative mechanism for transferring cases to the

Crown Court as an alternative to committal proceedings; granting the police a power of investigation comparable to those available to the Department of Trade and Industry under section 447 of the Companies Act 1985; changes to the evidential rule against hearsay allowing documents to be adduced as evidence of the truth of their contents; the introduction of preparatory hearings in which matters of law could be resolved in advance of trial; measures designed to penalise defendants who did not disclose their case prior to trial; an examination of the feasibility of a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud cases; and, most controversially of all, the abolition of jury trial for 'complex fraud cases' and its replacement of a 'Fraud Trials Tribunal' consisting of a judge and two lay assessors. Although individually many of the Committee's proposals, such as its recommendation that prosecuting counsel be appointed at an early stage in the investigation of serious fraud cases,[59] appeared to offer no more than minor changes to working practices and attitudes, taken as a whole its recommendations nevertheless seemed to represent a significant bid to develop the capacity of the criminal justice process to intervene against commercial fraud. The question, however, remains. Why was the Committee set up?

THE CAUSES BEHIND THE ESTABLISHMENT OF THE FRAUD TRIALS COMMITTEE

According to John Knox, a former Deputy Director of the SFO, the series of frauds at Lloyd's of London, the most notorious of which was the case against Walker and Moran, were the immediate cause of the establishment of the Fraud Trials Committee (Knox, 1992). Why these cases, as opposed to the legion of others which preceded them, should have prompted such a radical review of serious fraud prosecution might at first appear difficult to reconcile with the preceding decade of commercial fraud prosecution. The 1970's, which had witnessed the Secondary Banking Crisis,[60] had been punctuated by a series of failed prosecutions (Levi, 1987: 197), none of which, it seems, were considered important enough to prompt a radical re-examination of commercial fraud prosecution. The Jardine Working Party, an internal review which only made a number of modest recommendations, being the nearest. The Committee's own view of its origins was, however, unambiguous. On the subject of the announcement in Parliament which had signalled its establishment, the Committee's report recorded 'the concern which had been expressed about the range of problems generated by allegations of serious commercial fraud' (Fraud Trials Committee,

1986: 5). Against its summary of recommendations which had begun with a declaration of the public's loss of confidence in the legal system's capacity to bring 'the perpetrators of serious fraud expeditiously and effectively to book', the suggestion was clearly that it had been established in response to public pressure (Fraud Trials Committee, 1986: 1).[61]

This interpretation is questionable in view of the political context in which the Committee was established. At the time, fraud was not an issue of general concern and, if we rely on the news media and Parliament as an index of 'public opinion',[62] there had clearly been no increase in public concern since the late 1970's, the period in which the concept of *ad hoc* Fraud Investigation Groups had been devised and implemented. The coverage of the Lloyd's cases in the news media was brief by the standards of the mid-1980's. The report in *The Times* of Moran and Walker's acquittal, for instance, only ran to a paragraph (*The Times*, 1981). Parliament's curiosity was even less roused. Although fraud at Lloyd's of London proved destined to capture the imagination of MP's some three or four years after the event (see, for example, House of Commons, 1985c: col.'s 434-472), in the days and weeks immediately proceeding the verdicts, the significance of Moran and Walker's acquittals seemed to have been lost. No questions were asked in the House of Commons on their implications for the system of commercial fraud prosecution. This apparent absence of public concern begs a number of questions. Why, for instance, was there such a radical review of commercial fraud investigation and prosecution in the absence of public concern? Why did the Committee indicate that it had been established in response to public concern? And, most importantly of all, if public concern did not cause the Roskill Committee to be set up, what did?

These questions can only be answered by understanding the Government's primary reason for establishing the Fraud Trials Committee. Although it undertook what, on any measure, constituted a thorough and comprehensive review of every aspect of commercial fraud prosecution, it seems that neither the Government nor the Committee itself anticipated that it would. Contrary to its broad terms of reference, the Committee was principally established to examine the continued viability of jury trial for complex fraud cases. Near the beginning of its report, for instance, the Committee conceded that, at the outset, it felt that the 'main part' of its work would be 'concerned with the question of jury trials for fraud cases. This admission was supported by the content of the Committee's invitation for submissions of written evidence, the first substantive stage of its work, which focused principally on the

alternatives to jury trial for serious fraud cases (Fraud Trials Committee, 1986: 204; also see Levi, 1986: 395).[63] What is sometimes ignored, is that the Committee only resolved to undertake a detailed examination of the entire administrative and legal structure of commercial fraud investigation and prosecution once it became apparent from the evidence of witnesses that the jury was not considered to be the sole or even the major problem of commercial fraud prosecution (Fraud Trials Committee, 1986: 5). A fact which, as we shall see, has immense significance for understanding the creation and subsequent operation of the SFO.

Thus, the Fraud Trials Committee was established not to recommend the creation of an SFO, but to consider the abolition of jury trial - a controversial issue, but in terms of enhancing criminal justice intervention, far less radical than what it eventually recommended. To understand why jury trials had become an issue of importance it is necessary to appreciate how the underlying concerns that underpinned the reform process had begun to change in the early 1980's. The Jardine Working Party's primary conclusion had been to reaffirm that serious, but otherwise routine cases, of commercial fraud orchestrated by criminals or by career fraudsters were the major object of commercial fraud prosecution. By 1982, however, if not earlier,[64] the reform process had become almost exclusively associated with fraud committed in the City of London (Director of Public Prosecution, 1984: 12-14). Thus, in explaining the formal institution of the Fraud Investigation Group, the Director of Public Prosecution, in his evidence to the Fraud Trials Committee, stated that:

> 'Within the last two years there have been a number of cases in the City of London which have caused a great deal of concern not only to the public at large but also to the Bank of England and to the Treasury. As a result a Working Party under the chairmanship of a senior officer in the Treasury was formed in order to review prosecution arrangements. It was agreed that the FIG concept was a good one, that it should be extended and put on a more formal basis' (Director of Public Prosecutions, 1984: 14).

The prosecution, and presumably conviction, of these 'cases in the City of London' had (for reasons which will be considered below) become an issue of central importance to the Government. And it was this that increasingly began to shape and, just as importantly, sustain the momentum of the reform process. Reform to the organisation of commercial

prosecution (in the shape of the fraud investigation group concept) had already been set in train, leaving the court process itself as the last major obstruction to the cost effective and efficacious prosecution of City fraud. Some authors (see for example Levi, 1984; and 1986), have suggested that because cases other than those involving City fraud were of comparable complexity they too were responsible for generating the general 'disquiet with juries' (Fraud Trials Committee, 1986: 204). And therefore, both the establishment of the Committee and its subsequent recommendation to abolish the jury could also be explained in part by reference to fraud cases outside the City of London. What evidence that exists, however, tends to strongly suggest otherwise. Not only had the object of the reform process clearly experienced a decisive shift, but the definition of complex fraud which the Committee proposed as a guide to determine which cases should be tried without a conventional jury also clearly anticipated that it would, in the main, apply to cases 'involving the Stock Exchange, Lloyd's of London, and the commodities and futures markets' (Fraud Trials Committee, 1986: 153).

The jury had, for a number of years, been isolated as the principle obstacle within the court process to the prosecution and conviction of complex fraud in general, and City fraud cases in particular, as well as the source of long and unacceptably expensive trials; the latter having been a concern within the legal profession for some time (Levi, 1983, 257-261; 1984: 384; Fraud Trials Committee, 1986: 204; Berlins, 1977; Hughes, 1981). Several reasons had long been in circulation to justify the swelling tide of dissatisfaction with the jury. These have already been exhaustively analysed elsewhere (see Levi, 1983, 261-265; 1984; and 1987: 197-210), but in summary, a lay jury's inexperience of commerce, accounts, financial transactions and the rules which governed them, was thought to require considerably more elaborate and detailed explanations by Counsel of documents, methods of accounting and so on, than would otherwise be required for a judge and tribunal of professional assessors, or just a judge sitting alone. This inexperience of the world of commerce, aggravated by an unfamiliarity with court procedure, multiple defendants and charges, and the *modus operandi* of the fraud itself, was also thought to produce longer speeches by counsel, thus adding to the length of the trial and ultimately to its cost (DPP, 1984: 26; Fraud Trials Committee, 1986: 139-142). Moreover, the financial burden of long trials, although a major concern in itself, also informed the DPP's decision not to proceed against what he considered to be less serious cases. Thus, in his oral evidence to the Committee, the DPP stated:

> 'It plays a part in the decision making process in that where I feel that the likely cost of the prosecution would heavily outweigh the seriousness of the offence and the likely penalty I would not prosecute' (DPP, 1985: 2)

In addition to this, the difficulties of presenting a case to a jury in a readily comprehensible form, although rarely the sole reason, was sometimes a major factor in deciding not to proceed with a prosecution (Fraud Trials Committee, 1986: 142-143). Thus, in his written evidence to the Committee, the DPP referred to cases 'which are not prosecuted because they are thought too difficult to put over to a jury' (DPP, 1984: 26). Furthermore, the burden that long and complex fraud trials placed upon judges was also thought to obstruct the successful prosecution of City fraud. Mistakes during summing up were said to be increased (DPP, 1984 and 1985), leading defendants to being acquitted on appeal (Commissioner of the Police of the Metropolis, 1984: 13). In the case arising from the collapse of the Israel British Bank,[65] for instance, the DPP claimed that the trial judge's summing up was 'so poor' that the prosecution 'did not think that [it] could possibly hold it in the Court of Appeal and merely urged the Court of Appeal to apply the proviso which they did not do' (DPP, 1985: 17). Finally, the complexity of the trial was also said to increase the likelihood of judges admitting otherwise inadmissible and prejudicial evidence, leading to juries being discharged (DPP, 1984).

These twinned criticisms of the jury - its tendency to act at once as an obstruction to the prosecution of City fraud and as a source of long and expensive trials - led the Committee to recommend its abolition for complex fraud cases, which it was anticipated would usually involve City fraud, and its replacement with a Fraud Trials Tribunal comprising a judge and two professional jurors drawn from a panel of people with 'an experience of complex business transactions' (Fraud Trials Committee, 1986: 147). In the event the recommendation was not adopted by the Government (see below), but its Report did lead to the enactment of the Criminal Justice Act 1987, out of which came what proved to be an equally radical measure: the Serious Fraud Office.

The actual creation of the SFO in 1987 raises one of the most significant questions concerning the Office. Why, after six years of reforms which were so starved of resources to rob them of any radical impact on commercial fraud prosecution, did the Government

finally decide to establish an organisation which promised to significantly expand the scope of criminal justice intervention? To answer this question, it is necessary to examine the political significance of the financial service industry and its relationship to commercial fraud.

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[1] In the context of discharging its deterrent function, George Staple, the third Director of the SFO, referred to the unique pressure upon the SFO to demonstrate its effectiveness: 'I think it's getting the message across that if you do commit fraud there's a good chance of you being investigated and prosecuted and if it's serious enough, that it will be by the SFO, and if it is by the SFO, the SFO is seen by the public at large as an effective and efficient organisation' (Staple cited in Weait, 1995: 94).

[2] See for example section 47 of the FSA 1986.

[3] See section 12(1) of the Criminal Justice Act 1987.

[4] The 1986 Act vests the responsibility of regulating the financial service industry in the Secretary of State for Trade and Industry who is, in turn, empowered to the delegate that responsibility to a designated agency which, at present, is the Securities and Investment Board (the SIB was identified as such in section 114(2)). The SIB is a private company which is empowered to recognise a number of self-regulating bodies, each of which has responsibility for particular aspects of investment businesses. The principal self-regulating bodies are the self-regulating organisations (SRO's). To begin with there were five of these, but at present there exists just three after the amalgamation of the Securities Association (TSA) and Association of Futures Brokers and Dealers (AFBD) into the Securities and Futures Authority (SFA) and the absorption of the Investment Management Regulatory Organisation (IMRO) and Financial Intermediaries Managers and Brokers Regulatory Association (FIMBRA) into the Personal Investment Authority (PIA). Other important self-regulating organisations are the Recognised Professional Bodies (RPB's), which includes professional bodies such as the Law Society, Recognised Investment Exchanges (RIE's) and Recognised Clearing Houses (RCH's). Immediate executive control over regulation resides with the SIB which, in addition to determining the recognition of SRO's, retains general supervisory control over them. To this effect, the SIB, amongst other things, has the power to revoke recognition under section 11(1) if an SRO fails to satisfy the criteria set out in the Act contained within Schedule 2 and section 10(3) of the Act. One of the most important of these criteria is found in Schedule 2, paragraph 3, which makes the requirement that an SRO must have rules which will afford investors protection 'at least equivalent' to the rules issued by SIB for directly authorised persons a pre-condition of recognition, but it also includes an obligation to establish adequate monitoring and enforcement arrangements and effective arrangements for the investigation of complaints. A further feature of the SIB's supervisory position is that it can apply for an court order under section 12 requiring an SRO to comply with its statutory obligations or with the requirements of section 10(3) and Schedule 2 of the Act or direct the alteration or itself alter the rules of an SRO under section 13 where these do not satisfy the equivalence test. If the framework of regulation is designed to be underpinned by the SIB, its *modus operandi* is underpinned by exclusion. Section 3 of the Act stipulates that no one may carry on investment business in the UK unless he or she is authorised either directly by the SIB (under section 25) or, as is more common, by an SRO (under section 7), or unless he or she is an 'exempt person'. The same applies to firms which carry on investment business. For a

more comprehensive account of the regulatory apparatus put in place by the Financial Services Act of 1986 see Rider, Abrahams and Ferran, 1989.

[5] It was, for example, made a criminal offence, punishable with up to two years imprisonment, to practice in the financial services sector without first obtaining recognition from either the SIB or one of the self regulating bodies.

[6] A simple way of illustrating this is to compare the resources of the SFO and FIG with those made available to the self-regulatory apparatus put in place by the FSA 1986. Although, the resources made available to the institutions of criminal justice increased during the 1980's, in 1994 the combined budgets of the SFO and FIG was just £31 million (Review Team, 1994: 3) compared with the SRO's and Government Departments' (namely the DTI and Bank of England) operating costs incurred in regulating the financial services industry (excluding banking) in 1993 of £94 million (Franks and Schaefer, 1993: 24). These figures are also reflected in the number of lawyers and accountants employed by FIG and the SFO in 1994, which stood at 51 (Review Team, 1994: 3), and the number of regulators employed to regulate the financial service sector by the self regulatory bodies, DTI and Bank of England, which in 1993 amounted to 1,035 (Franks and Schaefer, 1993: 24).

[7] See Brake and Hale (1992) for a discussion of the politics of contemporary law and order strategies.

[8] Interview with John Wood, a one time Controller of the Fraud Investigation Group and the first Director of the SFO.

[9] See Appendix I for a short discussion of how these terms are defined in the context of this discussion.

[10] See, however, McConville, *et al* 1991 and the discussion on De Spretter Futures in Chapter VI.

[11] [1903] 1 Ch. 728, at 732-733.

[12] Such as *R v Quinn* (1898); *R v Radley* (1973); and *Welham v DPP* (1961), all of which were drawn upon by the House of Lords in *Scott*.

[13] [1975] A.C. 819 at 839, H.L.

[14] The assumption that the opinion in *Morris* (1984) (that an act authorised by the owner could not be an appropriation of that property) was to be followed in preference to the conflicting opinion in *Lawrence* (1972) was confirmed in *Shuck* (1992) immediately prior to the decision in *Gomez* (1993).

[15] Save for offences involving theft or intent to steal in respect of which section 2(1) of the Theft Act 1968 does explicitly exclude some general forms of conduct from amounting to dishonesty (section 1(3) of the Theft Act 1968; *Woolven*, 1983).

[16] [1982] Q.B. 1053 at 1064, *per* Lord Lane. The *Ghosh* direction, which applies to all offences involving dishonesty, is not always required. No direction is needed, for example, where the only issue is one of fact - whether, for instance, an alleged misrepresentation was true or false - and the defendant's conduct was 'obviously dishonest by ordinary standards' (*Price*, 1990). Moreover, even where the issue is not one of fact, a *Ghosh* direction is not

required if the issue is whether ordinary people would consider the alleged conduct dishonest unless the defence case suggests that the defendant knew that ordinary people would (*Roberts (William)*, 1987).

[17] The mentally ill, people with learning disabilities or those who are drunk or insulated from reasonable and honest people excepted.

[18] Griew uses the standard of 'ordinary people', applied in the formula propounded in *Feely* (1973), rather than 'reasonable and honest people' which was used in *Ghosh* (1982) because of the tautology involved in assessing dishonesty according to the standards of reasonable and honest people (Griew, 1985: 342).

[19] The Working Party comprised representatives of the Home Office, Department of Trade, the Director of Public Prosecution's Office and the police.

[20] Personal communication with John Wood (8th September 1994).

[21] A long-firm fraud is used to describe 'a business which orders substantial quantities of goods on credit at a time when the owners of the business either intend not to pay them or suspect that, as things stand at present, they may not be able to pay for them (Levi, 1981: 1).

[22] Personal communication with John Wood (8th September 1994).

[23] See Levi (1981) for a description of the distribution, staffing and organisation of specialist police fraud squads throughout the United Kingdom at this time.

[24] The MCPCFD comprised police officers from both the Metropolitan and the City of London police forces. The full complement of the MCPCFD for the years 1979-1986 acquired from a response given by the then Minister of the Home Department, Giles Shaw, to a written question from the Labour MP, Harry Cohen, in 1986 (House of Commons, 1986a: w.col. 511) is displayed in Appendix II (Table 1).

[25] Levi identified 'three principal sub-types' of long-firm fraud in his study. These were: the 'pre-planned' fraud, where businesses were set up with the sole intention of defrauding suppliers, 'intermediate' frauds, which occurred when company officers made a deliberate decision to turn a formerly legitimate business into one which defrauded its suppliers; and 'slippery-slope' frauds, which occurred when businessmen continued to trade and obtain goods on credit, although it was highly unlikely that they would be able to pay for goods (Levi, 1981: 1-2).

[26] The power of inspection under section 441 was also available to the Department of Trade and DPP.

[27] The section demanded that evidence of fraud was given and therefore required an affidavit to be sworn. The Jardine Working Party's report differed marginally to the DPP's written evidence to the Fraud Trials Committee on the extent of the delay inherent in section 441 applications. The report stated that it was possible, but by no means the norm to obtain an order within forty eight hours. The DPP, in his evidence to the Fraud Trials Committee, on the other hand, was more emphatic (at least in terms of the anodyne language used by civil servants) about the delay caused by section 441 applications. The procedure in his view was

'not conducive to a speedy investigation of the books and papers of the company where time is of the essence' (Director of Public Prosecutions, 1985: 9).

[28] See generally Leonard Leigh's *The Control of Commercial Fraud* for a useful overview of the Department of Trade's other functions and a comprehensive discussion of the full range of powers that it had at its disposal (Leigh, 1982). The Official Receiver, an officer of the court appointed by the Department of Trade where a company is wound up by the court, also had an important role to play in the investigation of commercial fraud, especially where otherwise legitimate companies were involved (for a more detailed discussion on the relevant law see Leigh, 1982: 159-166). Under section 236 of the Companies Act 1948, the Official Receiver was obliged to ascertain why a company had gone into liquidation and report any possible criminal offences to the Department of Trade. According to the Working Party about seventy five reports were made to the Department arising from company liquidations. Half of these concerned offences such as a failure to keep proper books, rather than commercial fraud. The Working Party's report recorded that about thirty cases a year involved company fraud and were reported to the DPP. The majority of these were returned to the Department of Trade, leaving the DPP to prosecute about six or seven each year (Working Party, 1979).

The Working Party identified two major flaws in the Official Receiver's capacity to initiate criminal proceedings. First, because there was rarely close co-operation between the police and Official Receivers, there was a danger that each left responsibility for investigation to the other. And second, that Official Receivers sometimes only referred cases to police when they were sure that criminal offences had been committed, by which time the case may have become stale (Working Party, 1979).

[29] Rather than at the request of the DPP or the police.

[30] Sections 109(1)(a)-(e) specified the type of companies that were covered by the provision. In addition to granting the Department the power to command the production of a company's books or papers from a present or former officer of the company, the section also empowered the Department to require anyone else who might have control or be in possession of the books or papers to produce them and to demand an explanation from them. Failure to comply with a production order without a cogent explanation was a criminal offence under section 109(3)(b) of the Act.

[31] Enquiries under section 109(1) were invariably carried out by the Companies Investigation Branch (CIB) at the Department.

[32] The Department's capacity to forward documents obtained under a section 109 investigation onto the police or DPP was limited to a number of specified criminal offences (Leigh, 1982: 166).

[33] See Appendix II (Table 2) for the number of investigations undertaken under sections 165(a) and (b) of the Companies Act 1948 for the years 1967 to 1978.

[34] See Appendix II (Table 3) for the number of inquiries initiated under section 109 of the Companies Act 1967 for the years 1967 to 1978.

[35] It would appear that Leigh based this suggestion on the Department of Trade's claims to the powers of section 109 investigations (see Rider, 1977: 150).

[36] Personal communication with John Wood (8th September 1994). Full powers of investigation were granted by sections 164, 165 and 172 of the Companies Act 1948 and by section 32 of the Companies Act 1967. Section 164 and 165 related to the affairs of companies in general, whereas the latter two sections related to interests in securities. Section 164 granted the (Secretary of State for the) Department of Trade a discretionary power to appoint inspectors where an application was made by a sufficient proportion of the membership of the company concerned. The applicants were required to show good cause for an investigation, and the Department was able, if it desired, to require them to provide security for costs. Section 165(a) imposed a duty on the Department to appoint inspectors if either by special resolution, or by an order from the court, the company declared that it should be investigated by an inspector. According to Leigh most investigations were conducted under the powers granted by section 165(b) (Leigh, 1982: 167). The Annual Statistics released by the Department of Trade do not, unfortunately, distinguish between investigations initiated under section 165(a) or section 165(b). However, both the Jardine Working Party's report and the DPP's written evidence to the Fraud Trials Tribunal discuss the latter as the most significant power that was used to investigate limited companies [so much so that no mention was made of sections 165(a), 172 or 32].

[37] This was not always the practice. However, inspectors were invariably appointed from outside the Department in cases of 'public interest and importance' (Director of Public Prosecutions, 1985: 7).

[38] The DPP's criticisms were made during the course of its evidence to the Fraud Trial Committee. The exact substance of the position taken by the Department of Trade on the aims of section 165 investigations is difficult to evaluate since the evidence that the Department gave to the Fraud Trials Committee remains partly confidential and, as such, closed to the public. This particular insight into the policy position of the Department was obtained from a discussion document made in pursuance of the Committee's examination into the powers of investigation relating to commercial fraud (see also Rider and Hew, 1977: 147).

[39] For a celebrated example see Raw, 1977. More generally see Leigh, 1982.

[40] The judgement of the Court of Appeal in *Norwest Holst Ltd. v Department of Trade* (1978) confirmed the fact that the Department of Trade was not legally obliged to warn a private limited company of the fact that it was to be investigated under section 165(b).

[41] Also see the DPP's evidence to the Fraud Trials Committee where he stated: 'There is nothing to stop criminal proceedings in advance of the conclusion of the Department of Trade enquiries but in practice the start of the criminal proceedings does not take place until the Department of Trade enquiry has been completed since it is only at that stage that the full strength of the cases is usually known' (Director of Public Prosecutions, 1984).

[42] Moreover, delays tended to cause further delay. As the Working Party put it: '...the officer in charge of the case may change several times during the course of the enquiry and on each change the replacement has to spend a great deal of time and effort in catching up' (Jardine Working Party, 1979).

[43] The above chronology of this case is to be found in the Public Records Office at LC/36.

[44] Although the report did note that 'some progress' had been made by the Department of Trade which had 'asked inspectors to be more careful in logging documents and, in future, will emphasise the importance of this in its letter of appointment to them' (Jardine Working Party, 1979).

[45] The case involving Halliday Simpson, the Manchester stockbrokers, exemplifies the then continuing problem of protracted investigations used as a justification, within the DPP's Office, to take no further action. The case had come to light through a Stock Exchange investigation begun in March 1981, when the Chieftan Unit Trust group asked the Council to examine certain share dealings that had been carried out with the group. This had followed an internal inquiry by Chieftan into an unrelated matter and the dismissal of Ian Hazeel, an investment manager, in September 1980 for alleged breaches of the Chieftan Trust deeds. Details of Hazeel's personal dealings were handed over to the Stock Exchange, and that information sparked the wider investigation into Halliday Simpson. The findings of the Stock Exchange investigation were posted in July 1982, after the firm had been suspended from trading in July 1981, pending the investigation into the firms dealings. The report concluded that, from March 1978 to March 1981, Halliday Simpson had been using its dealing suspense account as an 'open account', allowing some fund managers to book transactions to the account before specifying the ultimate recipient of the stock. To this effect, a fund manager might give instructions to Halliday Simpson to purchase stock and book it to the open account. If the price rose, the stock would be put through from the open account to the fund manager's institution at the new price. Entries were then created in the books of Halliday Simpson purporting to represent bargains for a private client account of the fund manager (or a relation, or possibly even an associate) at the prices at which the stock had been traded through the open account. As such, profits were transferred out of the open account to the beneficiaries of the agents involved in the transaction at the expense of the principal, or clients. If the price of the securities had fallen, the bargains would be booked directly to the client.

A further report was completed by the Stock Exchange council, and a statement was issued in late October 1982 detailing the transactions and parties involved in the use of the account. One of the more prominent series of transactions involved Sir Trevor Dawson, the chair of Arbuthnot Securities, the investment arm of the merchant bankers, Arbuthnot Latham. As a friend of the senior partner of Halliday Simpson, David Garner, Dawson had placed substantial orders with the firm which were routinely placed in the 'open account' after having been executed in the market. The surpluses in the account were then transferred to one of six client accounts by the manufacture of a pair of bargains, using the same security title and the same prices at which the 'open account' had purchased and sold the shares (Franks and Mayer, 1989: 107-111).

The Stock Exchange reports on the affair were eventually passed onto the DPP's Office and, in turn the City of London Police, after Garner and a number of others had been expelled from the Stock Exchange. The City Police's investigation continued until the summer of 1984, when the DPP, acting on the advice of Treasury Counsel Michael Corkery, decided to take no further action on the basis of the length of time which had passed since the deal was undertaken (Gillard, 1985: 31).

[46] The precise terms of reference required the Committee:

'to consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved and to consider what changes in existing law and procedure would be desirable to secure the just, expeditious and economical disposal of such proceedings.' (House of Commons, 1983: col.'s 83-84).

[47] Section 8 of PACE generally permits the police to apply for a warrant from a magistrate to enter and search premises, and seize and retain any material for which the search was authorised provided that: there are reasonable grounds for believing that a serious arrestable offence has been committed (defined in section 116); there is material of evidential value on the premises which is likely to be of substantial value to the investigation of the offence; the issue of the warrant is necessary; and that the material in question does not fall into a special class. To this latter effect, where the material has, amongst other things, been acquired or created in the course of any trade, business, profession or other occupation (so-called 'special procedure material'), the police are required to apply for an order to a circuit judge under the special procedure set out in Schedule I of the Act. The judge is required to make an order for production if: there are reasonable grounds for believing that a serious arrestable offence has been committed; the material is likely to have substantial value to the investigation; and it has likely evidential value and other methods of obtaining it have failed or are not worth trying because they are bound to fail and the public interest on balance requires production of the material. An application for an order must normally be made after notice has been given to the person holding the material, but a warrant may be issued by the judge where service of a notice could seriously prejudice the investigation. In addition to this general power of investigation, section 18 also empowered the police to search premises occupied or controlled by a suspect once he or she had been arrested (a power which before the section took effect probably did not exist - see *McLorie v Oxford* [1982] 2 All E.R. 280).

[48] Under the previous law, courts could grant warrants to search for evidence of other offences, such as drugs or stolen goods, but not evidence of fraud.

[49] Nigel Lawson, the Chancellor of the Exchequer announced the Government's intention to place the fraud investigation group arrangement on a permanent footing on 3rd July 1984 (House of Commons, 1984: col. 89). Thereafter, the news media's coverage of FIG, although never approaching the exposure obtained by the SFO, was extensive. Moreover, FIG was referred to on a regular basis by Government Ministers by way of illustrating the seriousness which the Government attached to commercial fraud prosecution (see, for example, House of Commons, 1985d: w.col. 360; and 1985b: col. 165).

[50] Several of the Jardine Report's recommendations found their way into law. Section 104 of the Companies Act 1981, for instance, granted the Department of Trade the power to disclose the results of inquiries under section 109 to the police and the DPP (by generally enabling the Department to disclose information to the police and DPP tending to show a criminal offence had been committed). In addition to this, a pilot scheme was set up in October 1995 involving a panel of 20 accountants who volunteered their services to the MCPCFD at fees considerably below the commercial rate (Fraud Trials Committee, 1986: 35).

[51] The DPP was required under the Prosecution of Offences Regulations 1978 (Statutory Instrument 1978, Number 1357, regulation 3) to 'institute, undertake or carry on criminal proceedings in any case which appears to him to be of importance or difficulty or which for

any other reason requires his intervention.' Moreover, in October 1981, at the request of the Lord Chief Justice, the DPP re-emphasised the need for chief officers to seek his advice at an early stage of a police investigation where the subject of inquiry was likely to prove complex or 'heavy' (Fraud Trials Committee, 1987: 13). There was, as such, a substantial overlap between the criteria of referral of fraud cases to the DPP's Office and the criteria upon which a 'FIG case' was designated (see below in main text).

The strict demarcation between the two divisions which were designed to prosecute FIG cases and the third division, which had a more general remit, soon disintegrated under the weight of the resourcing problems suffered by the Fraud Divisions. As time passed, the two FIG divisions were forced to accept non-FIG cases for investigation and prosecution as well as the non-FIG division taking on FIG cases (Williams, 1987).

[52] This power was similar to that previously available to the Department of Trade under section 109 of the Companies Act 1965.

[53] These given to a conference on fraud and read verbatim to the House of Commons by Tim Smith.

[54] On 2nd December 1985 the Attorney-General admitted to the House of Commons that the resources of FIG were 'seriously stretched' and, as such, were being reviewed (House of Commons, 1985a: col. 12).

[55] In the first year of its operation the SFO's full Parliamentary Grant was £6,086,000 for administration and £2,634,000 for investigations and prosecutions. The figure for administration reflected the exceptional start-up costs - which included the acquisition of premises, furniture and equipment. The purpose of the investigations and prosecutions grant was mainly to pay Counsel fees and accountants firms undertaking work for the Office (in the event, much of this was not needed, since none of the very large cases under investigation came to trial during the year and, as such, almost £1.4 million was surrendered to the Consolidated Fund) (SFO, 1989: 9). In the following year, the grant for administration and investigations and prosecutions costs was £5,814,000 and £5,305,000 (of which £3,450,00 was expended) respectively (SFO, 1990: 16). Over both years the number of cases under investigation was just over 60 (at the end of its first year its active case-load was 66, which fell to 61 by the end of its second year) (SFO, 1989: 7; and 1990: 6).

[56] This was one of the two cases which were first isolated for investigation and prosecution by a fraud investigation group.

[57] This was exemplified by both the above and also by the Treasury's refusal to grade posts high enough, making it 'impossible to recruit sufficient lawyers or accountants from outside' (Williams, 1987).

[58] Especially when one considers that one of two 'major objectives' of FIG was to enable the 'early identification of those cases where an investigation is unlikely to result in criminal proceedings so that the investigation may be discontinued and valuable manpower and other resources deployed to other investigations' (Home Office, 1985).

[59] Other similar measures, which merely required changes in working practices and attitudes included: the appointment in each serious case of a 'Case Controller' who would be

responsible for piloting the case from the outset to the verdict (whose responsibility would include directing the investigation, employing accountancy and legal services, briefing prosecuting counsel and ensuring at all times that there was close co-operation between them); the call for more resources in the form, for instance, of better remuneration for the barristers and of more accountants; the suggestion that police officers be kept in fraud squads for longer than the normal three years in order to increase the expertise of the prosecution; and the early appointment of the trial judge who would have responsibility for the case from the moment of transfer (Fraud Trials Committee, 1986: 179-189).

[60] For a discussion of the Secondary Banking Crisis see Clarke, 1986: 12-52; and Moran, 1984.

[61] Although, the Committee's report also mentioned the 'general feeling' at the time of its appointment that the scale of serious fraud cases escaping detection and prosecution threatened to have 'harmful consequences' for the 'reputation' of the City of London, this, rather surprisingly, was presented as being only of subsidiary importance to its establishment (Fraud Trials Committee, 1986: 1).

[62] The means by which organisations and committees working either for or on behalf of the state gauge public opinion is difficult to state with any precision. Whether or not the method of evaluation is universal is also open to question. At my time at the SFO, Parliament and the news media were exclusively relied upon by its senior staff as the principal measures of public opinion. Hall *et al*, also observe that the judiciary tend to rely on the news media as the principal source of the views of the public (Hall, *et al*, 1978).

[63] The relevant part of the invitation stated the following:

'The prevalent disquiet...with the present system of jury trials for what have come to be called 'serious fraud cases'...has led to the setting up of the Committee. The Committee, therefore, sees as its principal task the review of that system in light of the evidence which it expected to receive. The complaints include the lengths of some recent fraud trials and the unfair burden which the system is said to cast upon those selected for jury service in these cases as well as the difficulties which some juries are said to have encountered in assimilating a mass of often highly technical and complex evidence. Suggestions have been made for different modes of trial in these cases as for example trial by a single judge sitting either with assessors or with a jury, whether of the same or a smaller number as at present, selected for its special qualifications, or trial by three judges, with perhaps one with special qualifications, sitting without a jury...' (Fraud Trials Committee, 1986: 204).

Leon Brittan, the then Home Secretary, in announcing the appointment of the Committee stated that it would consider 'the way in which courts deal' with serious commercial fraud (House of Commons, 1983: w.col. 83-4). This, of course, like the formal terms of reference of the Committee, tended to state its remit more broadly, but it is still noteworthy that his remarks implied that the Committee's deliberations would be confined to the trial process.

[64] As Knox's interpretation of the immediate cause of the establishment of the Committee suggests.

[65] This case was reported as *Landy* [1981] 1 W.L.R. 355, C.A.

THE CREATION OF THE SERIOUS FRAUD OFFICE

The foregoing discussion, with its focus on the legal and administrative framework of commercial fraud prosecution, primarily concentrated on the immediate or technical impulse of reform, that is, a growing realisation within Government that the State's criminal justice apparatus was ill-equipped to economically meet the existing demand for criminal justice intervention against commercial fraud with the effect that only a small sample of cases were prosecuted and, of these, fewer still convicted. The discussion also suggested that, despite the restrictions which were at once contained within and imposed on the reforms, real improvements were nevertheless made to commercial fraud prosecution, and that these, to some extent, were aimed at realising the prosecution of fraud committed by 'otherwise' legitimate commercial organisations which had seemed to routinely escape prosecution in the late 1970's and early 1980's.

If, however, we are to completely understand the conditions which were necessary for the state to mobilise its criminal justice apparatus against the commercial form (or at least individuals using the commercial form to commit fraud) a discussion which focuses simply on a dissonance between demand and supply is inadequate in a number of respects. Most importantly, it fails to explain why an appreciation of the disjunction between the demand for criminal justice intervention and the State's inability to meet that demand produced a response. A more specific omission from the previous discussion was that it failed to explore why 'cases in the City of London' and, even more importantly, what particular forms of this type of fraud, were so central to producing a response. Another, related matter which, again, was not addressed was why the reform process had for so long been gripped by a peculiar paralysis which inhibited a truly ground-breaking response, even when it was clear that the chronically under-funded Fraud Divisions of the CPS could not meet the demand for commercial fraud prosecution in general, let alone City fraud prosecution.

This is especially significant given that once the report of the Fraud Trials Committee had been published, the process seemed to be in the grip of a breathtaking acceleration of change. Within four months of the publication of the report, for instance, a meeting of Ministers took place to discuss the establishment of the Committee's proposal for a new organisation of commercial fraud detection, investigation and prosecution (SG/IC1, 1987: 2). In the meantime, the Home Secretary was in discussion with senior ranking members of the police, to secure its commitment to the new project. This was followed some four months later with the establishment of an inter-departmental steering group[1] to implement the SFO which was intent on circumventing as much civil service bureaucracy as possible to ensure that the SFO was 'up and running' the instant the Criminal Justice Act 1987 took effect. Amongst other things, it secured the early appointment of an SFO Director-designate to 'make recruitment easier and so that administrative arrangements could proceed more effectively'. It also took the unusual step of obtaining funds from the Contingency Fund to cover the costs of staffing arrangements prior to the Criminal Justice Bill receiving Royal Assent, (SG/R1, 1986: 3-8). This hive of activity was also reflected in the speed of the Bill's passage through Parliament. In little over a year after the publication of the Committee's report, the Criminal Justice Act 1987 received Royal Assent; an Act which although not drastically changing the organisational structure of commercial fraud prosecution, did produce the SFO, the first organisation to be provided with a realistic level of funding to prosecute the most serious and complex cases of commercial fraud which were reported to the authorities. These omissions now fall to be discussed.

THE SFO AND THE FRAUD TRIALS COMMITTEE

Several authors have offered explanations of the creation of the SFO (see, for example, Levi, 1987 and 1993; and Kirk and Woodcock, 1992; Weait, 1995). Some, such as Matthew Weait, have tended to explain the establishment of the SFO as a simple consequence of the Committee's recommendation to consider introducing an 'integrated body with authority to investigate and prosecute serious fraud'; pausing to add, by way of embellishment or analysis, that the Committee's recommendation had arisen from 'the perceived public concern over the inefficiency of the system' (Weait, 1995: 90). This form of analysis, informed perhaps by the contiguity of the Committee's Report and the creation of the SFO, conceals far more than it reveals. More specifically, in assuming near perfect

continuity between the Committee's recommendations and the creation of the SFO, it not only fails to explain why 'public concern' galvanised the Government into action, but, in so doing, also ignores the subtle constellation of political, economic and ideological pressures and alliances which converged on the event to produce each discrete stage in the reform process, with the implication that those pressures and alliances were uniform and unchanging. The social forces which drove the reform process at different times did overlap, but each was a unique configuration of elements derived from what had gone before, determining what could be done in the present and hence what might eventuate in the future. If the SFO's operation, and therefore the SFO itself, is to be truly understood, a precise understanding of the configuration of these elements is essential to appreciating what precipitated the reforms, how they became altered and how they dissolved.

The Committee, as we have seen, was originally set up to examine the viability of jury trial in complex fraud cases, to complement rather than advocate the replacement of those measures which had already been set in motion to improve the capacity of the state to investigate and prosecute commercial fraud.[2] It was never envisaged that it would undertake a critical examination of the organisation of commercial fraud investigation and prosecution - which the Committee even considered beyond its remit (Fraud Trials Committee, 1986: 27) - let alone urge the Government to re-assess its recent reforms to the organisation of commercial fraud prosecution. What is more important, however, is that the organisation proposed by the Committee differed considerably in form from that which the SFO eventually took.

The Committee's proposal was far more extensive, consisting of a single, unified organisation, with 'full powers of investigation' - comprising the investigative and prosecution functions of the police, DTI, DPP's Office, Inland Revenue and Customs and Excise - which would be 'responsible for all the functions of detection, investigation and prosecution of serious fraud' (Fraud Trials Committee, 1986: 26-27). This was in part said to be necessary to circumvent the 'degree of institutional reluctance among the organisations concerned to work fully and effectively together' (Fraud Trials Committee, 1986: 26), but the full catalogue of reasons put forward by the Committee was more comprehensive. Only such an organisation with 'uniform control and direction', the Committee concluded, would effectively ensure that disclosure of information between organisations was not inhibited, that fewer serious frauds escaped prosecution by 'slipping

through the net of a series of independent organisations working in this field', that duplication of resources would be avoided, and that efficiency would be maximised and delays reduced (Fraud Trials Committee, 1986: 26). The SFO, on the other hand, was a far more modest creation: more a modified and co-ordinated version of FIG - better resourced, with greater powers and a far more distinctive identity - than a radically different social formation.[3] Although it was granted a new power of investigation under section 2 of the Criminal Justice Act 1987, it had no powers of detection, it did not supersede the investigative and prosecution functions of the Revenue Departments, nor were the police, a significant part of its investigative capacity, formally brought under its control and direction.

According to the minutes of the first inter-departmental steering group, Government Ministers had originally expressed a desire for a 'unified organisation involved in detection, investigation and prosecution'. But the idea was soon jettisoned when it became clear that its realisation required too radical and time-consuming a reform to the position of the police; achievable only 'with extensive constitutional and legislative amendments to the position of the police and their powers' (SG/R1, 1986: 2). Instead, the role of detection was left to 'the regulatory bodies and intelligence units such as that of the Fraud Squad' (SG/R1, 1986: 5) with the attendant risk of serious frauds escaping prosecution by 'slipping through the net' of the complex matrix of independent organisations responsible for detecting fraud (Fraud Trials Committee, 1986: 26). Moreover, by superimposing the SFO onto the existing infrastructure of commercial fraud investigation, the new arrangements failed to completely eliminate the duplication of resources identified by the Committee. This proved most acute in relation to those cases which came to light through DTI inquiries. At first the SFO sought to ignore the problem by relying heavily on DTI investigations (see the Guinness case for example), but after the problems that this produced in the Blue Arrow trial (see Levi, 1993), the SFO had to revert to undertaking its own comprehensive investigation in addition to the one already conducted by the DTI (see, for example, *R v Anthony Cole and others*, 1993; BAF01/WC1, 1993).

Furthermore, the organisational form of the SFO, in failing to bring the police formally under the control of the Director did nothing to address what the Committee had identified as one of the major obstructions to prosecution: inter-organisational resistance to co-operation. On the contrary, the indication from the outset was that, despite the creation of

the SFO, 'institutional reluctance' to co-operate would continue. An early proposal put forward by the police in July 1986, for instance, that support for the SFO should come from the Metropolitan and City Fraud Squad when required, was rejected on the basis that it was 'not thought a sufficiently firm commitment' (SG/IC1, 1987). In the event, after an intervention from the Home Secretary, a designated group of police officers from the Metropolitan Police and the City Fraud Squad, 'who would be supplemented to meet special needs', were attached to the SFO under a 'bi-partite arrangement' within which the SFO would rely on the police's powers of search and arrest. (SG/R1, 1986: 2).

Nonetheless, the fact that the Commissioner of the Metropolitan Police and the Commissioner of the City of London Police continued to exercise operational control over the officers working with the SFO, with the right to recall them 'at any time during their attachment' (SG/IC2, 1987), left some of the civil servants working on the steering group with the suspicion that there would be 'continuing problems in the future over the level of police commitment to the Office'(SG/IC3, 1988). This suspicion seems to have been well-founded. In 1994, for instance, the Graham Review into the handling of serious fraud (see Chapter V) recorded the SFO's concern over its lack of 'adequate control over police officers' and the continuing 'difficulties over the level of police resources devoted to cases and...the management...of the investigation' (Review Team, 1994: 15; also see Levi, 1993: 43-49). The latter difficulty was captured perfectly in the views of an accountant working on the Bank of Credit and Commerce International (BCCI) inquiry (which, incidentally, proved to be one of the most successful campaigns undertaken by the SFO):

> '...the weekly team meetings became a scrap between police officers and accountants...at the end of the day in BCCI we had enormous problems because it was a very accountancy intensive case and accountants wanted to know what police officers had been doing and sometimes could not find out and, on the other side, section 2 interviews were taking place where we did not report everything that went on as implicitly carefully as perhaps we should have done. So enormous tensions built up over a period of time. It was only the professionalism and the fact that people at the top did keep talking to one another that we overcame these problems, but I'm convinced that we would have had far less pressure upon us, if there had not been that seed-bed of potential conflict of decision-making' (SFO/IC3, 1993)

Thus, the SFO neither incorporated the Committee's recommendations for a new organisation in full, nor overcame the flaws in the organisation of commercial fraud investigation and prosecution which had warranted those recommendations. Some sense of why the Government decided not to legislate for the Committee's proposal has already been given, but what is more significant in terms of understanding the SFO, is that the Government still persisted with a new and independent organisation even though it proved to be a far more diluted version of what the Committee had recommended.

To explain it simply as a necessary technical measure poses a number of problems. If we consider the Committee's proposal, it is clear that a new organisation was indispensable if its recommendations were to be realised and its criticisms of the existing organisation of commercial fraud investigation and prosecution eliminated. An organisation with powers of detection and 'uniform control and direction' could not have been created simply by modifying FIG. Most, if not all, of the technical changes embodied within the SFO, on the other hand, could have been facilitated by reforming FIG.[4] The restrictions on disclosure of information between organisations could, for example, have been removed through legislation in much the same way as section 104 of the Companies Act 1981 had done in respect of the results of section 109 inquiries. Similarly, the Government could have sought to forge closer links between the DTI and the Fraud Divisions within the CPS or, alternatively, accountants and even Crown Prosecutors at FIG could have been given special powers of investigation by 'ring-fencing' FIG within the Crown Prosecution Service (CPS) as was later proposed by the CPS in its submissions to the Graham Review (Review Team, 1994: 24). This, significantly, would, as the Graham Review later recorded, have had a number of advantages; the most obvious, in view of the importance attached to financial considerations within the reform process, being lower administrative and managerial overheads (Review Team, 1994: 25).

This is not to say that the establishment of an independent SFO cannot be explained in mere technical terms. One way of explaining its establishment which places a greater emphasis on technical considerations, for instance, is to say that the FIG concept had simply failed and needed to be replaced. This is precisely the argument that Weait seems to adopt, notwithstanding his efforts to avoid fully committing himself to it by referring to the 'perceived public concern' over the inefficiency of the system (see above). Unfortunately, it is only tenable if we ignore the striking organisational similarities between FIG and the

SFO. Moreover, given that, in organisational terms, the SFO did not differ greatly from FIG, it also contradicts the views of the DPP, the DTI and to a lesser extent the police (whose qualified endorsement of FIG seemed more to reflect its concern over losing even more control over the investigation and prosecution of crime after the creation of the CPS) who were confident that the FIG concept could be a success provided it was granted sufficient resources (see above). Another way of explaining the establishment of an independent SFO is to focus on inertia within Government. To this effect, it might be argued that the Government simply failed to revise its original aim of establishing an independent organisation with full after having discovered that to create an organisation with full powers of detection would have taken too much time and unnecessary legislation. This explanation has its merits, but a better way of understanding the creation of the SFO is to explore the political value of a new and independent organisation. That is to say, in terms of the creation of the SFO being driven more by the demand for a new organisation than by a series of technical innovations which depended on the establishment of a new organisation.

This interpretation is indispensable to understanding the creation of the SFO and not only derives support from the evidence, but also other academics who have examined the organisation. According to John Wood, for instance, the Government's immediate, if incomplete, response to the recommendations of the Fraud Trials Committee was a direct and simple result of Parliamentary criticism over the failings of the existing system of commercial fraud prosecution.[5] Wood's explanation of the SFO's creation as a distinctive and powerful response to direct political pressure does not represent a novel insight. It is one also shared by academic writers who have studied the SFO. Michael Levi, for instance, although not exclusively explaining the SFO in terms of political criticism, acknowledges that 'legitimation motives loomed large in [the] establishment of the SFO.' (see Levi, 1987; Levi, 1995: 183). Similarly, Weait's vague observation that the SFO was 'set up in part to demonstrate a public commitment on the part of the Government to the investigation and prosecution of serious and complex fraud', seems to attest much the same thing (Weait, 1995: 107).[6]

These above observations provide a useful starting point in examining the constellation of social pressures which led to the SFO's creation, especially in identifying the symbolic dimensions of the SFO. As we shall see, the criticisms of the Government's failure to

successfully reorganise commercial fraud prosecution were an important reason for its commitment to realising some of the major recommendations of the Fraud Trials Committee - particularly the SFO. However, focusing solely on the political pressure the Government was operating under, whilst leaving the question of legitimacy acknowledged but unexplored, is insufficient to completely understand the SFO. Since it not only fails to explain why the legitimacy of Government required the creation of the SFO, but it also ignores the other pressures which had sustained the reform process throughout the 1980's and were therefore highly relevant to the SFO's establishment. The following discussion begins with an analysis of these other pressures and concludes with a more detailed examination of the legitimating role of the organisation.

THE SERIOUS FRAUD OFFICE AND THE FINANCIAL SERVICES INDUSTRY

As part of the discussion in the foregoing chapter it was noted that cases of fraud in the City of London had become central to shaping the momentum of the reform process during the early 1980's. This observation bears some parallels with Michael Clarke's study of reform to the City's regulation in which he isolated publicised fraud as a central variable in the development of legislation such as the Banking Act 1979, the Lloyd's Act 1982 and the Financial Services Act 1986 (Clarke, 1986; also see Clarke, 1981). Clarke is not alone in drawing a link between scandal and reform. Anthony Hilton, for instance, locates the Norton Warburg affair as the prime inspiration of Professor Gower's review of financial regulation which led to the enactment of the FSA 1986 (Hilton, 1987; see also Levi, 1987). As we saw in the second chapter, however, there were a succession of fraud scandals in the 1970s, none of which had an appreciable impact on the organisation of commercial fraud prosecution. The phenomena of publicised fraud, in other words, is not sufficient in itself to explain reform to commercial fraud prosecution. This is not to deny its importance to the reform process. It is simply that to understand their effect it is necessary to situate them within two parallel and related developments in the financial services industry - the massive structural changes to the organisation of London's financial markets[7] and attendant developments within the regulatory régime overseeing those markets.

THE CITY OF LONDON, GOVERNMENT ECONOMIC POLICY AND THE REFORM OF COMMERCIAL FRAUD PROSECUTION

Throughout the early 1980s the driving force of the process was the concern - common to all the major sectors of the financial services industry, and shared by the Treasury and Bank of England (see above) - over the state's failure to meet the demand for the prosecution of financial fraud in the City and the financial service sector of the economy. Although it is important to resist conceptualising the financial services industry as an homogenous entity (Grant, 1993: 66-83), a consensus seemed to exist on the issue of reform to the criminal justice process. Not one of the representative bodies or senior figures within the industry, either in their evidence to the Fraud Trials Committee or in one of the many conferences in which the question of fraud was discussed, expressed anything but enthusiasm and impatience for a more effective system of commercial fraud prosecution. In January 1984, for instance, during a conference on the future of the Stock Exchange, Peter Wills, the then deputy chair of the Exchange, called upon the Government to expedite the work of the Roskill Committee (Moore, 1984a). Nor was he simply expressing a personal view. On the contrary, his comments reflected the declared policy of the Council for the Stock Exchange which, in its written evidence to the Fraud Trials Committee, professed to 'share the present disquiet both at the delays in the prosecution of serious fraud and at the reluctance to prosecute' (Council of the Stock Exchange, 1984). These views were also echoed by the Council for the Securities Industry which, in welcoming the appointment of the Committee, claimed to have 'long been concerned about the difficulties of investigating commercial fraud and of achieving the conviction of those guilty of committing it' (Council for the Securities Industry, 1984). Similarly, in giving written evidence on behalf of the Ruling Council of Lloyd's, its head of external relations decried the DPP's decision not to proceed with a number of internal inquiry reports on fraudulent reinsurance schemes that Lloyd's had supplied to the Director's Office with a view to prosecution; adding that this had caused 'wide consternation and 'disappointment' at Lloyd's (Ruling Council of Lloyd's of London, 1984).

Of equal significance was that when Government Departments were called upon to assess the value of a particular reform to commercial fraud prosecution, the City's approval was sometimes cited as a crucial factor in assessing its merits. The City's support for the reform process seemed to be integral to preserving its momentum. Thus, in celebrating the virtues of FIG in its written evidence to the Fraud Trials Committee, for instance, the Home Office revealed:

> '...certainly the FIG has created an air of confidence in the City, in the police's ability to deal successfully with fraud' (Home Office, 1984).

To understand why the objectives of the reform process were sometimes identified with the requirements of the City, some understanding of the City's importance to the Government's economic policy is essential. A central pillar of the successive Conservative administrations of the 1980s was to change the role of money and finance and to strengthen the position of the financial sector. The Government's strategy was to promote the financial sector while transforming it to secure its status in a financial world that was fast changing under the impact of internationalisation and new technology. To this end, the Government attempted to channel and redirect a series of developments already underway within the international financial markets.

The most important of these developments was the convergence or internationalisation of financial markets. Internationalisation was not a new phenomena, although its form had changed over the decades. Whereas the 1970s, for instance, had witnessed the growth in the euromarkets, the adoption of floating exchange rates and the expansion in multinational banking, the following decade saw the growth of international bond and equity markets and the acceleration of cross-border dealing in derivative instruments such as futures and options (Coakley and Harris, 1992; Moran, 1991). The most prominent of these changes, which became known collectively as the City or financial services revolution, was the re-regulation of the London Stock Exchange (Moran, 1991; George, 1985). This involved important changes in trading practices and ownership structures to the Exchange itself and its member firms. It had been brought about by a powerful combination of external pressures, the most important of which was an intensification in international competition - unleashed on the Exchange after the abolition of exchange controls in 1979[8] - and advances in technology. Technological innovation in communications, combined with a decline in its real cost, had encouraged the integration of different markets in different time zones. Closer integration allowed banks, financial institutions and large industrial companies to scan money and currency markets on a world-wide basis to meet their requirements, thereby increasing the mobility of financial capital. This had a devastating impact on securities firms in the UK. The United Kingdom's securities industry, centred on the London Stock Exchange, had long been sufficient to satisfy the requirements of British

investors and British industry. This was so even though trading on the Exchange was subject to a number of restrictions, such as the limitation on membership and minimum commissions. By the end of the 1970's, however, it had become apparent that these restrictions were undermining the Exchange. The abolition of minimum commissions on Wall Street in 1975 had unleashed a tide of change, producing a far more competitive industry in which the UK was playing only a small part. When exchange controls were removed leading to a large outflow in investment from the UK, for instance, only a negligible proportion was actually handled by UK houses. Nearly all of it was channelled through the London or foreign offices of overseas securities houses, which were not bound by the commission rules of the Exchange and could offer superior net prices in larger amounts than London firms. In addition to this, member firms of the Exchange only had small capital resources, putting them at a considerable disadvantage in world markets. The sum effect of these disadvantages was that a number of major UK shares were being more heavily traded in New York than in London (Deputy Governor, 1985; George, 1985).

The Government's aim was to persuade the member firms of the Exchange through the Bank of England to embrace change which would put it in a better position to compete on the international stage (Moran, 1991). As the then Deputy Governor of the Bank of England put it, 'if the UK securities industry could not adapt, and fairly quickly, its future was bleak' (Deputy Governor, 1985). The first stage in the process of adaptation was the Government's decision to terminate the case against the Exchange in the Restrictive Practices Court in return for an undertaking to abolish minimum commissions by the end of 1986. It soon became clear that the abolition of minimum commissions would also necessitate the end of single capacity where stock-brokers and jobbers traded as separate entities. Once it was recognised that single capacity would end, it also became apparent that the new broker-dealers, acting as principals in the market, would have to be well capitalised to compete. Most of the existing firms, many of whom were partnerships, had minimal capital. The establishment of larger, better capitalised firms was therefore essential. The banks were identified as being well positioned to undertake this role, leading to a relaxation in the rules governing the ownership of the Exchange's member firms and their eventual take-over by British and foreign banks (Deputy Governor, 1985; Hilton, 1987; Moran 1991). The sum effect was that, in the medium term at least, the Exchange was well positioned to compete in the international securities market (Coakley and Harris, 1992).

This is not to say that, in shaping the financial services revolution, the Government simply acted upon the instructions of the City institutions. The City's interests were not homogenous, nor did its short-term goals coincide with its long term objectives (Hilton, 1987). As Moran has observed some of the important changes of the 1980s, such as the deregulation of the Stock Exchange, happened because the state was prepared to override those business interests hostile to radical reform in the financial markets. Nevertheless, the Government's over-arching strategy was to preserve the City's status as a leading financial centre. As Coakley and Harris put it, 'whatever happened to manufacturing, the City was intended to flourish' (Coakley and Harris, 1992: 37).

The Government's motivation in improving the efficiency of commercial fraud prosecution was intimately related to its over-arching goal of promoting London as a major financial centre. Its concern was that if fraud became too prevalent or well-publicised investors and financial institutions would be deterred from transacting business there. The dramatic changes taking place in the financial markets tended to accentuate this concern. John Wood, for instance, claimed that the SFO had been established, in part, in anticipation of the newly deregulated financial markets unleashing a tide of competition and innovation which would provide greater motivation and opportunity to commit fraud (Wood, 1986).

There were two major planks to the Government's policy of commercial fraud control. The first was to develop a system of financial regulation which would provide the basic framework for the transaction of business. As Leon Brittan, the then Secretary of State for Trade, explained during the second reading of the Financial Services Bill, the establishment of a new regulatory apparatus to prevent fraud was vital to preserving the integrity of the markets during a period of dramatic change:

> 'It is our responsibility that [investors] can have confidence in the good practice and honesty of those who do business in the City. That confidence is all the more important with the increasing competition between financial centres of the world. If the City of London is to remain a leading centre, then there must be no doubt about the integrity of its institutions, because once that doubt takes root it is only too easy for the customers of the City to take their business elsewhere' (House of Commons, 1986c: col. 940).

The second major plank of the Government's policy of promoting London as a predictable place to transact business was to improve the effectiveness of commercial fraud prosecution. As Douglas Hurd, the then Home Secretary, explained in a statement on the report of the Fraud Trials Committee:

> 'We are determined to bring about the changes in law, practice, and attitudes which are necessary...the reputation of our financial institutions, and of the City of London in particular, needs the support of effective action against fraud.' (House of Commons, 1986c: 927).

THE CASES WHICH UNDERPINNED THE REFORM OF COMMERCIAL FRAUD PROSECUTION

The concern that commercial fraud would effect London's position as a leading financial centre was shared by the City itself. According to the Bank of England in its written evidence to the Fraud Trials Committee, the City's major anxiety was that fraud was rarely perceived as being confined to those who had committed it, but rather tended to taint the entire market.

> 'What is certain, however, is that widely reported scandals, like those at Lloyd's or the Halliday Simpson affair in the Stock Exchange, lead people inside and outside the City to suppose that fraudulent behaviour of this sort must be rife in all City activities. That is damaging to the great majority of honest people who work in the financial services industry...' (Bank of England, 1984b).

What is important to understand about both the Government's and the City of London's concern in promoting commercial fraud prosecution was the type of fraud cases which formed the context to the calls for a more efficient régime of commercial fraud prosecution. This is important because, as we saw in the foregoing chapter, the concept of commercial fraud embraces immense variation. Moreover, since it is also an open-ended concept, the types of commercial fraud which were being committed during the development of the fraud process are essential to understanding what drove it. Since it was these forms of commercial fraud which were considered to undermine London's reputation and it was therefore these forms of commercial fraud which formed the subject of the reform process. A sense of chronology is also essential. As we shall see, when the Fraud Trials Committee

published its report the motivating pressures of the reform process changed dramatically. The issue of commercial fraud prosecution became an overt political issue. What is important are those forms of commercial fraud which were publicised before the Committee published its report, since it was these which propelled the reform process before fraud prosecution became greatly politicised.

The most striking feature of the more prominent cases of alleged fraud which bore some relation to the City and came to be associated in both Parliament and the news with the City was that none - excepting the cases at Lloyd's and the collapse of the Norton Warburg Group Limited - involved established London firms. Some involved small licensed securities dealers trading outside of London, such as the Manchester stock-broking firm Halliday Simpson, others involved small commodity dealers, like Miller Carnegie for instance, others still involved small investment management firms, such as Farrington Stead, others involved fraud committed on the City's financial institutions such as the series of cases to emerge from the collapse of the Johnson Matthey Bank, whilst others involved fraud committed by individuals using the City as a cloak of respectability. As the DPP stated in his written evidence to the Fraud Trials Committee:

> 'This is perhaps a good place to refer to a type of case which causes concern to the City of London... a small company with capital of between £100 and £1,000 is set up by nationals of a foreign state, quite often by Germans. Glossy brochures are then produced inviting money to be invested in commodities in this country and these brochures are distributed to potential investors abroad... the offenders hold out that they are experienced commodity brokers with an excellent reputation within the City of London, in reality they are true fraudsmen and as soon as the money is received in this country it is immediately transferred to bank accounts abroad, most particularly in Switzerland, Liechtenstein or Panama...the offenders decamp to enjoy the proceeds of their fraud...The City and the police say, with some justification, that this type of offence gives the City a bad name and are critical of me for not prosecuting. I appreciate their concern but in these cases it is necessary to seek the evidence of private witnesses from abroad with no guarantee that they will attend the proceedings ' (Director of Public Prosecutions, 1984).

Throughout the early to mid 1980s, in other words, the impetus behind the reform process was not so much the demand for the prosecution of all forms of commercial fraud, but

rather the prosecution of fraud either against established City institutions or involving companies either outside or on the periphery of the City. The logic of the reform process was therefore unproblematic. The prosecution of commercial fraud would, first and foremost, deter fraud committed either against or on the periphery of the City, but it would also label as aberrant the collapse of small financial firms which were damaging the integrity of London as a whole.

THE SERIOUS FRAUD OFFICE AND THE LEGITIMACY OF THE STATE

The establishment of the SFO - equipped with its special powers of investigation and granted recourse to procedural mechanisms which would facilitate the prosecution process - was, in part, intended to be an instrument of commercial fraud control. It was, in part, an organisation purposely established to enhance the state's capacity to investigate and prosecute commercial fraud for the purpose of securing the integrity of London's financial markets. However, it was not simply a response to the demand of financial institutions for a more efficient means of securing convictions against commercial fraudsters. It was also a symbolic creation - designed at once to be a potent symbol of the Government's commitment to prosecuting fraud and to convey a specific image of criminal justice and state power.

The proposition that the symbolic dimensions of the SFO were not simply an oblique effect of its distinctive organisational form, but rather an intended effect, must be treated with caution. This is not to say that there is no direct evidence supporting the argument that the SFO was established for symbolic ends to mark a defining moment in the reform process. As Barbara Mills once declared, for instance, the SFO was established as a 'flagship organisation'. This description of the SFO was elaborated some five years later in an unpublished paper of a Working Group (comprising members of the SFO, the CPS and the Home Office) set up under the Davie Review to examine the reasons for the SFO remaining independent from the CPS:

> 'Any move to abolish the SFO will need careful presentation so as not to be regarded as a lessening of the Government's commitment to the investigation and prosecution of serious and complex fraud...The existence of the SFO as a separate department

> committed to investigation and prosecution of serious and complex fraud has until now been seen as an important element in the system. Even if assurances could be given that it would remain completely ring-fenced within the CPS the message would be that the Government was lessening its resolve to investigate and prosecute such cases and would need to be countered effectively.' (DR/WGR1, 1994)

Nonetheless, a lack of direct evidence of the Government's reasons for creating a new and independent organisation poses a number of problems in distinguishing between what the SFO was designed to represent from what it came to represent in the circumstances of its creation. However, given that a new organisation did not appear to be an absolute necessity in improving the efficiency of commercial fraud prosecution, given the climate in which the Government considered the recommendation of the Fraud Trials Committee for a new organisation of commercial fraud prosecution. and given the way Government Ministers represented the new SFO, it is reasonable to conclude that the SFO's symbolic dimension was an intended effect.

To understand the symbolic importance of a new organisation of commercial fraud prosecution it is first necessary to appreciate the relationship between commercial fraud, the City, the Conservative Party and the FSA 1986. This is because it was how this relationship came to be understood during the mid 1980s which eventually made the concept of a new organisation of commercial fraud prosecution a political necessity - forcing the Government to turn its attention to regenerating the legitimacy of its distinctive strategy of law-and-order.

Until 1985, the problem of commercial fraud prosecution, and the prosecution of fraud in the City in particular, had essentially been confined to those with a direct involvement in the financial markets - the trade associations of established financial service institutions, the Bank of England and the relevant institutions of the state.[9] As 1985 drew to a close, however, commercial fraud prosecution gradually became an issue of acute political significance. The first major Parliamentary Debate on fraud in the City of London took place on December 18th 1985 - the eve of the publication of the Financial Services Bill (House of Commons, 1985). The Labour MP Allan Rogers, in opening the debate for the opposition, defined the terms of the following political dialogue which were to underpin all subsequent exchanges on the issue:

'Of late, the Government seems to have an obsession with standards...Not long ago we were listening to the leaders of the Conservative party talking about standards in society - the need for more law and order, for hanging terrorists, for birching hunt saboteurs, for flogging miners...The one area in which they seem to be lacking in standards is in dealing with their friends in the City of London.' (House of Commons, 1985: col. 433)

The allegation that the Government was being lenient to its 'friends in the City' was one which a Conservative Government was particularly vulnerable to. Its links with the City were numerous and well documented. One of the major sites of the Government's association with the City was its programme of privatisation - one of the major planks of its economic policy. As the programme developed through the 1980s it became entwined with the Government's ideology of popular capitalism, in which the broadening of share ownership featured centrally, as well as corresponding to its strategy of promoting the City. As Coakley and Harris have argued, the policy 'had a significant impact on the City's business', generating short-term fee revenue from transferring the assets of nationalised industries and from underwriting the share issues (Coakley and Harris, 1992: 50). Privatisation not only linked the Government to the City, but the considerable profits the policy generated for the City also gave the impression that the Government was promoting the City's interests at the expense of society as a whole (see, for example, House of Commons, 1985: col.'s 443-444). More significant, however, were the close financial links between the City and the Conservative Party. These were publicised extensively during the mid to late 1980s. A report in *The Guardian*, for instance, recorded that a Labour Research Department survey had found that in addition to the eight Cabinet members who had interests in the City before joining the Government and the fifty four backbench MP's who were retained as company directors, consultants and advisors by City companies, more than a quarter of all company donations to the Conservative Party had come from the City (Harper, 1987; see also Wyn, 1993; Hilton, 1987). In summing up the survey's findings, the report in *The Guardian* concluded that 'a stiff line over financial malpractices would be against the interest of the Tories' (Harper, 1987).

The fact that the Conservative Party's close links to the City made its policy on financial regulation vulnerable to criticism was acknowledged within the Party itself. A paper written by Maurice Button for the Bow Group (a Conservative Party 'think tank') argued

that the Government's intention to realise some of the recommendations of the Fraud Trials Committee was vital since:

> 'The City is perceived by the electorate to be the embodiment of capitalism to such an extent that any adverse comment on its integrity is potentially damaging to the Conservative Government. The present situation gives the Government the opportunity to demonstrate that it has a fair and prudent attitude to the City, and to silence its critics.' (Button, 1986)

The theme of the Government's leniency towards its 'friends in the City' was therefore one which had a significant impact on the legitimacy of the Government's policy on financial regulation. This theme was to continue throughout the first major debate on fraud in the City of London, in much the same spirit as it was to continue throughout 1986 and 1987. After comparing the resources available for the prosecution of welfare fraudsters with the number of staff at the DPP responsible for commercial fraud prosecution, Rogers added:

> 'There is one law for the rich and another for the poor - steal £20 from the DHSS and one ends up in gaol, but steal £20 million from the City and one will end up in the Cayman Islands. That is the Conservatives' attitude to their friends in the City.' (House of Commons, 1985: col. 434).

The comparison between the state's response to social security fraud and conventional theft and its inaction over commercial fraud was one which posed significant ideological problems for the Government's policy on crime. More specifically, it was capable of being developed to undermine the integrity of its law-and-order strategy. As Bryan Gould observed, the Government had made 'great play of their stance on law and order', but there had been 'no talk of short, sharp shocks and all sorts of other severe penalties, new resources and so on', rather the emphasis had 'always been on the great difficulties, problems and obstacles'. This was not, he observed, 'the same language as we hear about other criminal offences' (House of Commons, 1985: col. 441).

What made the criticism even more powerful was the ease with which the Opposition were able to link the Government's free market economic policy to its permissive attitude to fraud in the City. As Rogers observed, the Conservative Government had 'aided and encouraged' those who committed fraud in the City, since not only had it done nothing to

improve commercial fraud prosecution, but it had also promoted a 'free market amorality' which created the conditions in which widespread fraud flourished. 'Straight dealing', he argued, had been 'sacrificed on the altar of competition' (House of Commons, 1985: col.'s 435-436). More significant, however, the Opposition claimed that the Government's complicity in the rise of commercial fraud was not simply because it pursued free market economics, or that it had failed to reform the organisations of commercial fraud prosecution, but because it shared the City's inability to distinguish between legitimate trading and fraud. Bryan Gould, for example, claimed that the 'real problems' at Lloyd's had arisen 'not just because there are a few crooks at the margins', but because 'the reinsurance deals, the offshore arrangements to avoid taxes and the baby syndicates were embraced by the establishment'. The establishment, he added, was 'tainted by those practices and lost the ability to make the distinction between what was acceptable and what was not.' The problem of drawing a distinction between fraud and legitimate profit making, he claimed, was not, however, unique to Lloyd's. 'Many of the people in the City', he argued, 'do not fully understand what is required of them now, and what will be required of them in the future' (House of Commons, 1985: col. 443).

Although the question of commercial fraud prosecution had begun as a relatively closed debate over its potential impact on London's position as a leading financial centre, by the end of 1985 it had transformed into an overt political issue commanding a high profile. As 1986 unfolded, the criticisms of the Government's inaction over commercial fraud prosecution were to assume even greater significance as the Financial Services Bill - the Government's attempt to regulate the newly transformed financial markets - made its passage through Parliament.

A series of debates on the subject of the City of London and its regulation ensued which were followed closely in the news media. One of the most significant took place on March 12th, 1986, four months after the publication of the Financial Services Bill. The Opposition's arguments were almost identical to those it had rehearsed in the first major debate on commercial fraud in the City of London. Roy Hattersley called upon the Government to 'put aside considerations of political support and personal connection' and introduce a system of regulation of financial services which would 'provide an adequate response to the increase in City fraud' (House of Commons, 1986c: col. 941). The content of Hattersley's speech, however, differed in one important respect from the debate which

preceded it. Whereas before the Government had been accused of promoting the interests of its supporters in the City, it was now claimed to be powerless before the City. Hattersley summarised the major economic issues of the period. He reminded MPs that unemployment stood at 3.5 million, that real interest rates were at record levels and that the UK now imported manufactured goods of a value greater than it exported. He also highlighted the damaging effects of the 'take-over boom', its focus on the short-term and its generation of profits for those working in the City at the expense of those working in manufacturing. These trends, he claimed, were attributable to 'the Government's enthusiasm for economic policies which benefit[ed] the City but damage[d] the rest of the economy.' The Government's promotion of the City, he continued, had meant that its economic policy had 'benefited financial services but worked directly against the interest of manufacture, employment and visible trade' (House of Commons, 1986c: col.'s 941-944).

Significantly, it was during this debate that John MacGregor (the then Chief Secretary to the Treasury) was forced to repeat the announcement, first made by Douglas Hurd in February (House of Commons, 1986b: col. 927), that the Government was considering the establishment of a new organisation of commercial fraud prosecution. MacGregor declared that, despite the Opposition's claims that the Government was protecting those who committed commercial fraud, he was reviewing the Fraud Trials Committee's recommendation to combine the resources of the police, the DPP the companies inspectorate of the Department of Trade and the revenue's departments into one unit (House of Commons, 1986c: col. 949).

CONCLUSION

The social inspiration of the SFO was a distinct configuration of political pressure, economic demand and ideological imperative. The Government's promotion of the City is especially crucial to understanding the SFO's creation. As Moran has observed, the operation of financial markets is dominated by 'a ceaseless struggle for comparative advantage' - a struggle between firms, but also between financial centres (Moran, 1991: 5). Within the struggle for comparative advantage the state exercises control over the most critical resource - the system of regulation. The extent, form and purpose of state intervention is the single most important feature of any system of financial regulation and this system is itself a source of comparative advantage or disadvantage (Moran, 1991: 6).

Although the pattern of regulation affects the competitive conditions of all sectors of the economy, financial services are uniquely sensitive to regulation. This is because, 'the 'goods' traded are themselves mostly regulatory creations' (Moran, 1991: 6). As Reed has pointed out, London's comparative advantage as a world financial centre is due, above all, to a flexible regulatory policy since, unlike Tokyo or New York, it cannot draw business from a vibrant real national economy (Moran, 1991). The importance of flexible regulation to London's competitive position was an integral component of the Government's decision to maintain the practitioner-based system of regulation under the FSA 1986. As Norman Tebbit (the then Secretary of State for Trade and Industry) said in a debate on the Gower report,[10] the role of his Department and therefore the regulation of the financial services industry was 'not only to regulate the industry but to foster it'. His objective was to see 'the maximum freedom for market forces to stimulate competition and encourage innovation' (House of Commons, 1984b: col. 50). However, without an efficient system of criminal prosecution, a self-regulatory régime was particularly vulnerable to abuse (Clarke, 1986; Leigh, 1987). As Tebbit acknowledged, the integrity of self-regulation depended on 'vigorous enforcement of the criminal law, as expressed in existing statutes', adding that 'a sharp increase in the probability of conviction of fraudsters would strengthen the hand of the overwhelming majority of honest City businesses and improve the confidence of their customers' (House of Commons, 1984b: col. 51)

The SFO was therefore designed, in part, to complement the FSA 1986. However, its creation was not a simple function of the Government's policy on financial services regulation. The creation of the SFO can also be understood as a measure necessary to secure the integrity of the Government's economic and social policy. When the Fraud Trials Committee's report was published, the Government had come under intense pressure to alter its policy towards the financial services industry. The City was portrayed as exercising ultimate power over the state which was shaping its economic policy to benefit the City at the expense of the economy as a whole. This policy was not only represented as extending to the Government's policy on financial regulation, but also commercial fraud prosecution. The Government's promotion of the City was presented as a superior demand to its policy on law-and-order, the over-arching philosophy of criminal justice. The creation of the SFO was not wholly reducible to the politics of law-and-order - the relationship between the two was more tangential than it was direct. However, the politics of law-and-order created the conditions in which the SFO had become a political necessity -

highlighting the partial scope of law-and-order and the fiction of equal treatment before the law. As Douglas Hurd had said in a debate on the Fraud Trials Committee's report:

> 'There must be no escape for offenders simply because their offences are highly complicated or because they can employ large resources to cover them up - the enforcement of the law must be even-handed.' (House of Commons, 1986b: col. 927).

The decision to place the FIG on a permanent footing had proved ineffective in disabling the criticisms of the Government's relationship with the City of London. It was not a sufficiently powerful declaration of change at a time when the Government's insistence on promoting the continued self-regulation of the financial services industry had served to fuel criticism of its commitment to preserving the City's position as a discrete enclave beyond the authority of the law and state control. The power of the allegation resided in its capacity to link the Government's role in the City's economic success to its policy on regulation. A new organisation was required to signal the birth of a new era in commercial fraud prosecution - to dispel criticism that the Government's support of the City extended to support of commercial fraud. The creation of the SFO, a wholly new and independent organisation, was an ideal way of not only demonstrating that the Government was committed to the prosecution of commercial fraud but, more importantly, that the City would not escape strict regulation.

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[1] The Steering Group, which first met on 19 December 1986, included representatives of the Law Officers' Department, the Crown Prosecution Service , the Home Office, the Inland Revenue, the Management and Personnel Office at the Cabinet Office, the Bank of England, the Northern Ireland Office, the Department of Trade and Industry, the Treasury, Customs and Excise and the police (SG/R1, 1986: 1).

[2] Thus, in announcing the Government's intention to place the fraud investigation group on a more permanent footing, Nigel Lawson, the then Chancellor of the Exchequer, stated that the review which had preceded it, had been 'complementary' to the work of the Fraud Trials Committee (House of Commons, 1984: w.col. 89).

[3] The Royal Commission noted that FIG and the SFO work 'quite differently' (Royal Commission, 1993: 23; also see Levi, 1993). Although there are structural differences which effect the role that each organisation plays in investigating specific cases, these differences are greatly exaggerated in practice by the amount of funds made available to discrete investigations (see the Review Team, 1994).

[4] This is not to deny that the SFO marked a significant technical advance in the organisation of commercial fraud investigation and prosecution; simply that it neither

altered the structural flaws and shortcomings which the Committee had identified, nor the problems associated with them.

[5] Personal communication (8th September 1994).

[6] David Kirk and Anthony Woodcock, serious fraud defence lawyers, have argued along similar lines; claiming that the Conservative Party's close links to both the 'philosophy and the captains of capitalism' impelled them to introduce measures to control what Edward Heath had once coined as the 'unacceptable face of capitalism' (1992: 2).

[7] This, as with the term City of London which is used throughout this study, is a short-hand way of expressing both the primary and secondary financial markets based in the City of London, the United Kingdom's principal financial centre, and the institutional savings markets (see Smith, 1978).

[8] The abolition of exchange controls was the single most important event in terms of exposing the Stock Exchange to international competition. Prior to their abolition, the portfolio decisions of UK pension funds and financial institutions operated under severe constraints which imposed considerable restrictions on institutions' capacity to invest overseas. Once these institutions were freely allowed to make their own portfolio choices the results were dramatic. Total net external claims by the UK on overseas grew from £2 billion in the mid-1970s to nearly £56 billion, 25 *per cent* of UK national income - in the mid-1980s (Deputy Governor, 1985: 75).

[9] This is not to say that the prosecution of commercial fraud had escaped criticism before the 1985, simply that before the end of 1985 criticism of commercial fraud prosecution tended to be isolated and was developed on a sustained basis.

[10] The Gower report, published in 1984, provided the eventual framework for the FSA (Gower, 1984).

4

UNVEILING THE SERIOUS FRAUD OFFICE

But I am concerned about the whole question of oppression of someone like myself. I am very well aware that the reason why I am in this trial is because I am Lord Spens. I think if I were Joe Bloggs I would not be here.

Lord Spens, The Central Criminal Court, 21st September 1989.

The foregoing chapters examined the series of reforms which recast the mechanisms of commercial fraud prosecution during the 1980's. A large part of the discussion simply chronicled how the reform process had developed, from the obscure origins of the Jardine Working Party, to its culmination just under a decade later in the creation of one of the most conspicuous institutions to emerge from the 1980's - the Serious Fraud Office. The principal aim of the discussion, however, was not to state the chronology of the reforms, but to explain the process, and particularly the establishment of the SFO, in terms of the social context in which it evolved - to understand, in other words, the events, developments and pressures that inspired its creation and the various functions that it was designed to serve. This chapter, and the next, take the history of the SFO a stage further and examine how it has operated during the seven year period between 6th April 1988, when it became fully operational, and 4th April 1995. Although the discussion in this chapter examines the operation of the SFO, it does not, however, focus on the technical dimension of its operation - the strategies it employs to investigate cases and construct them for prosecution (although where relevant these questions will be considered). Its aim, rather, is to examine the type of cases that the SFO has prosecuted - the product of its operation, in short, as opposed to its form. Before discussing the cases however, some justification of how I intend to analyse them is required. To this end, it is necessary first to explore the significance of the symbolic dimension of the SFO.

THE SFO AS AN INSTITUTION OF SOCIAL SIGNIFICATION[1]

One of the central themes to emerge towards the end of the last chapter concerned the role of the SFO as an institution of social signification. To this effect, it was suggested that the design of the SFO, the function it was authorised to perform and, most importantly of all, the political climate in which it came into existence, contrived to promote a particular image of the Office. The Criminal Justice Act of 1987 might have simply defined its function as the investigation and prosecution of serious or complex fraud,[2] but the SFO came to signify much more. It became a potent symbol of the State's commitment to regulating the City of London, the entire City of London, large and established financial institutions as well as the small and newly formed.

THE SERIOUS FRAUD OFFICE, THE FINANCIAL SERVICES ACT OF 1986 AND THE CITY OF LONDON

At the very moment the SFO became fully operational its image was cast in opposition to the City of London. The importance of this juxtaposition to the integrity of the government's policy on financial regulation in the mid-1980's was critical. The Criminal Justice Act of 1987 had received Royal Assent less than a year after the FSA 1986. The legislation which, although designed to restructure the regulation of the financial service industry, had become far more closely associated with the regulation of the City of London during its passage through Parliament. The regulatory infrastructure put in place by the FSA has already been considered, so it is unnecessary to rehearse its detail here. Suffice to say, however, the Act was widely disparaged as a triumph of form over content; a measure which had merely served to put the industry dominated system of regulation that existed before the Act on a more formal, statutory basis. Whilst academic opinion has proved to be deeply divided on the impact of the FSA - especially in relation to the extent to which it has attenuated the financial service industry's control over its own regulation[3] - when the Act was passed it was nevertheless widely acknowledged as having put a considerable emphasis on the industry to create and enforce the rules that governed it. This failure to bring the financial service industry, and more specifically the City of London, within a strict statutory regime proved highly controversial at the time. Much of the controversy was confined to the House of Commons, but as it dragged on (having originally erupted in the early part of

1986) it gradually began to receive coverage in the news media and resurfaced repeatedly in the lead up to the 1987 General Election. To appreciate the origins and significance of the controversy, it is important to first understand what the City of London represents.

At one level the City of London is simply a geographical area with clearly defined boundaries, its own municipal government (the Corporation of London), and its own police force (the City of London Police). It is also, however, the UK's principal financial centre and, as such, it is used as a term of convenience to describe those financial institutions (including financial markets[4]) which either operate or are located within or in the immediate vicinity of the City of London. In his book, *The City within a State*, Anthony Hilton, for example, used the term to describe the financial markets, banking industry[5] and the practices of the legal and accountancy professions based, or primarily based, in the financial community in London (Hilton, 1987: 2). By attempting to define the contours of his subject matter, Hilton stands as an exception among commentators on the City of London. Many other accounts of the City simply refer to it as the geographical centre of the UK's financial community (see for example, Plender and Wallace, 1985: 1; and Durham, 1992: 3). Others still, including reports in the news media and serious academic accounts on the subject, even fail to go this far and refer at length to the City without first advancing a definition of what it encompasses (see for example, Harris *et* al, 1988; and Clarke, 1986).

This inattention to the basic institutional composition of the City does not necessarily render a discussion on the subject incomplete. In fact, in some respects, to define the City simply in terms of the financial organisations and institutions that enmesh to form its financial structure is to miss its true significance altogether. The term conjures up something more intangible, yet certainly more profound, than mere institutions and organisations. The City evokes power, economic power. If we look back to the periods in history when the City has dominated public debate in Britain, it is possible to observe politicians and industrialists paying reluctant homage to this, the fundamental dimension of the City. Whenever the subject of foreign exchange or interest rates has taken centre stage in politics or when British industry's performance relative to the rest of world has come under scrutiny, it is the City of London's pivotal role in the British economy that is brought into question, challenged, but ultimately left unchanged (see, for example, Coakley and Harris's analysis of the Report of the Wilson Committee). More recently, as Britain's two major political parties have embraced the virtues of the market economy, the impact of the City on the

British economy has developed a sense of its own inevitability. But although its power goes largely unquestioned,[6] it nevertheless continues to be recognised. The City's reaction to a cut in the base rate, for example, is still the standard that news journalists use to access its economic efficacy. To summarise, the City does not simply denote the institutions that comprise financial capital, it also connotes the over-arching economic power that those institutions and organisations can exercise collectively as financial capital to constrain, regulate or undermine the plans of industrial enterprise or the state.[7]

The FSA proposals proved so controversial precisely because the City of London represents the primordial site of economic power within society. Since the FSA appeared to give the City a continued licence to exist as a private empire outside the law and State control, the government were exposed to the criticism of having deferred to the power of financial capital or, worse still, of having intentionally sought to preserve its privileged extra-legal position. These accusations penetrated the core of the Conservative Government's ruling philosophy. In 1979, they had come to power extolling the imperative of social discipline as a pre-condition of national regeneration. The standard of discipline demanded was the unqualified respect for the 'rule of law',[8] a demand that was to assume a central position in the politics of the 1980's (Hall, 1980). Throughout the first Conservative administration, the 'rule of law' was summoned to win legitimacy for a variety of criminal justice reforms and policing operations; the most notable being the crack-down of the inner-cities in 1980 and 1981 (Brake and Hale, 1992: 47-51). But, it was during the Conservatives' second period in office, in the context of the miners strike, that the 'rule of law' as an ideological weapon was used to its greatest effect. Throughout the dispute it was skilfully used by both the police and Conservative Ministers to set up the policing of the dispute as a battle between the public interest on the one hand - reified by the State as the keepers of the law - and the sectional demands of the miners on the other (Fine and Miller, 1985: 1-22). It was at this point that the political currency of the 'rule of law' reached its peak, and the Conservative Government became more intimately identified with it than at any time since 1979. Although the 'rule of law' might remain an ambiguous concept, at the very least it signified the fundamental right of equal treatment under the law. Its persuasive power being heavily dependant on its appeal to the twinned ideals of impartiality and universality. The proposed regime of financial regulation, coming only a year after the conclusion of the miners strike, was, as such, vulnerable to being portrayed as a partisan repudiation of these ideals. As a system of control based on the principle of self-regulation[9] - which was widely

regarded as having permitted the City to observe a far more diluted form of legal discipline than other sections of society were forced to endure - it seemed to celebrate legal inequality rather than equality. Thus, rather than signifying a genuine attempt to bring the financial service industry within the law, the FSA was seen as having compromised the integrity of one of the key planks of the government's legitimating philosophy.

The SFO provided an ideal and necessary foil to the criticisms of the Government's policy on financial regulation. As a prosecution agency, it was designed to operate within the existing structure of criminal justice, the most coercive medium of control available to the State, conveying a potent symbolism of censure, condemnation and reprobation within a clearly defined set of legal rules.[10] It therefore represented a powerful way of vindicating the government's otherwise ambivalent approach to financial regulation, by showing that, ultimately, the City would not escape the demands of a strict and uncompromising legal regime. More significantly, it served to articulate a distinctive message about the distribution and character of power within society; a testament to the primacy of the State over finance capital and a powerful declaration of its resolution to impose its authority through the law without discrimination (see below). In short, it represented a police force which, although established to secure the stability and the long term viability of the UK's financial markets, would nevertheless ultimately operate in the wider interests of society against the City of London whenever the criminal law was seriously violated.

A BREAK WITH THE PAST

Thus, at the moment of its creation, the SFO was draped in symbolism. As I have already suggested, its full symbolic significance can only truly be understood in terms of the events and developments that were taking place in the financial service industry when it came into existence. There was, however, one notable exception to this, and that was the strong sense of change that the SFO encapsulated. This effect was dependant to a much larger extent on its form and how it compared to the previous machinery of commercial fraud prosecution. It was also a necessary pre-condition of the SFO being received as a genuine attempt to bring the City of London under the authority of the criminal law - for the simple reason that the traditional forms of commercial fraud prosecution were at best widely seen as structurally ineffectual, and at worst peculiarly susceptible to direct political interference. An appearance of dramatic change was necessary to consign these perceptions to the past. The

SFO was ideally suited to signify that change. It was a wholly new, comparatively well-resourced organisation which had required the enactment of primary legislation before it could come into existence. It stood independently from the traditional organisations of criminal investigation and prosecution. It had been granted special powers of investigation and access to certain procedural mechanisms, such as the power of transfer,[11] which were designed to expedite the construction of cases for prosecution and their course through the courts. It was, as Barbara Mills described it, a 'flagship organisation'. As such, unlike the Fraud Investigation Group, a far more discreet creation which had evolved gradually from within the CPS and which was as bereft of a special power of investigation as it was any other truly distinguishing characteristic, the SFO was a highly distinctive organisation. It declared the existence of the reform process, underwriting its direction and integrity. In its absence it is probable that the significance of the process - a drift towards a more specialised and potentially more effective system of commercial fraud prosecution - would have been lost. As the new conspicuous police force of the City of London, however, the SFO marked a defining moment in the contemporary history of commercial fraud prosecution - a definitive break with the past which signalled the end of the old order of commercial fraud prosecution and the beginning of a new era dominated by purposely designed and well-resourced forms of control.

Images of the SFO

The image of the SFO as a ground-breaking institution is a powerful one. It is an image which embraces a number of strands. At one level it encapsulates a sense of technical innovation characterised by the increased resources and greater investigative powers granted to the SFO and the more coherently organised form of commercial fraud prosecution that it represented. But these technical innovations also suggest that the SFO was ground-breaking in effect as well as form, for not only were they designed to increase the number of convictions secured at trial, but also the number of cases investigated and prosecuted - ground-breaking, in short, in the sense of expanding the scope of criminal justice intervention. That the SFO has broken new ground in this latter sense is a core theme in discourses which feature the organisation. Barbara Mills once said, for example that she believed that the SFO was 'breaking very new ground' and 'investigating cases nobody would have tackled before' (Barbara Mills, quoted in Gibb, 1992), a sentiment echoed by her successor, George Staple, who claimed that many of the SFO's cases 'simply would not

have been prosecuted at all' prior to its existence (Staple, 1994a). Leading academics concur - Michael Levi, for example, has stated that:

> 'One of the significant changes brought about by the Serious Fraud Office has been to bring an area of formerly private commercial misconduct - or areas that, where known about, were public only in the sense of being dealt with by insolvency practitioners or by securities and banking regulators - into the arena of the criminal courts and, thereby, into greater public visibility and debate' (Levi, 1993: 9).

The image of the SFO as an expansionist and ground-breaking institution seems to have stayed with the SFO throughout much of its existence. The same is true of the other key dimension of the image it inherited at its inception, a dimension which is deeply enmeshed with the image of expansionism, serving at once to underpin and define its contours: that is of an organisation which routinely prosecutes cases of 'City fraud', including some of the City of London's largest and most established financial institutions. To this effect, politicians and successive Directors of the SFO have frequently associated the SFO with the City of London. In *The Financial Times'* coverage of the acquittal of the Maxwell brothers, for example, Alistair Darling, then Labour's City spokesperson, was reported as having called for a review of the SFO's role in the prosecution of 'City crimes' (Mason and Rice, 1986). His comments were echoed by his colleague Paul Boateng, Labour's former spokesperson on legal affairs, who claimed that the verdicts brought into question the SFO's future in the 'process of bringing to justice those responsible for City fraud.' (Ashworth, Midgley and Horsnell, 1996). Whilst the SFO's Directors have not, strictly speaking, cast the SFO in opposition to the City London, they have, nevertheless, frequently associated its function with the regulation of the City of London. Thus, in 1989, John Wood, the first director of the SFO, cited as one of three 'long-term aims of the SFO', the 'economic benefit' that the Office promised to bring if its operation 'generate[d] greater confidence in the City of London' (Wood, 1989: 177). The third Director of the SFO, George Staple, continued to perpetuate the image in a series of speeches delivered at conferences around the country. At a conference of Judges from the Wales and Chester Circuit, for instance, he spelt out the economically empathetic role of the SFO in the regulation of the City of London, stating that:

> 'The City of London is...a vital component, not only of the UK's financial system, but also the international system...Without a reputation for fair dealing the City's standing as

> a financial centre would surely wither. It needs strong and effective guardians. We must ensure that financial markets are honestly managed and transgressors in those markets are swiftly discovered, convicted and punished...Certainly the Serious Fraud Office will continue to do its best to deter fraudulent activity by timely and effective investigation and prosecution.' (Staple, 1994a)[12]

Moreover, even in the year that the Davie Report[13] was published, the introduction to the SFO's Annual Report for the year ending April 1995 stated that:

> '...the SFO plays an essential part in maintaining confidence in the UK's financial institutions and in the City of London's role as an international financial capital' (Serious Fraud Office, 1995: 8)

Some of the SFO's more recent public pronouncements on its operation have tended to stress its prosecution of small investments businesses; therefore disassociating it from its traditional link with the City of London. Although these explanations of the SFO's operation differ considerably from some of the statements cited above, they nevertheless tend to mystify its past. More specifically, by emphasising a shift in the SFO's focus from the prosecution of companies representing economic power to smaller companies, these statements tend to confirm the SFO's past focus on cases associated with the City of London. Significantly, however, this change in the SFO's chosen method of explaining its position within the regulation of business has not been decisive. Roslind Wright's[14] bid to align the SFO alongside the new expanded SIB (NewRO) as the prosecution arm of the new regulatory body, for instance, marks a return to public announcements by the SFO associating it with the regulation of the financial service industry and the City in particular (Atkinson, 1997).

What makes the SFO's continuing representation as the police force of the City of London all the more significant, however, is that it is an image that resonates throughout public discussion on the SFO, an image which second to its description as an organisation designed to prosecute serious and complex fraud (a description which at once says everything and nothing about its operation and the type of cases it prosecutes) is the one most constantly reproduced in the news media, the major source of information on the SFO. The following examples of how the news media has defined the role of the SFO illustrate its continued

currency. The first extract is taken from an interview in the *Financial Times* with Barbara Mills, shortly after she took over the directorship of the SFO:

> 'On Mrs Mills' shoulders rests much of the responsibility for maintaining confidence in the integrity of London's financial markets. By creating the SFO, the government signalled its belief that deregulated financial markets prosper only with beefed-up policing' (Donkin and Waters, 1990).

The image of the City police force (personified, this time, by Barbara Mills), was echoed two years later in another interview with Barbara Mills in *The Times*. Frances Gibb, the legal affairs correspondent of *The Times*, opened her account of the interview by proclaiming that Barbara Mills did not have 'the expected image of a City fraud fighter' (Gibb, 1992). It was also an image that was used widely in the wake of the acquittal, in October 1994, of George Walker, the former Chair and Chief Executive of Brent Walker PLC, the leisure and property conglomerate (see below). Martin Lynn, of *The Sunday Times*, wrote, for example, that the verdict could potentially lead the Davie Review (see chapter V) to recommend that the SFO be merged with the Crown Prosecution Service, there 'ending its independent role as an investigator and prosecutor of City crime' (Lynn, 1994). And finally, although it remains outside the period under examination, it was also an image which was frequently alluded to in the aftermath of the acquittal of the Maxwell brothers in January of 1996. To this effect, John Mason, the Courts Correspondent of *The Financial Times*, wrote that the acquittals would threaten the immediate survival of the SFO, as the Davie Review had already 'endorsed its long-term future as the best means in an imperfect world of tackling City fraud' (Mason, 1996).

Although, the SFO's image in the news media as the police force of the City has, to a large extent, remained a constant throughout its existence, it is important to stress that there has been a gradual shift in the type of cases that have formed the basis of that representation. When the SFO was first established, in the wake of the Guinness affair and shortly after the PCW scandal at Lloyd's and a succession of frauds committed through medium sized stock-broking firms and investment management businesses, the news media's association of the SFO with the City of London seemed relatively unambiguous. The SFO was (despite the fact that two of the defendants in the first Guinness trial were not financial service professionals) understood to exist primarily for the purpose of investigating and prosecuting fraud committed by either financial service professionals or through financial institutions

located in the City (see, for example, Donkin and Waters, 1990). This particular incarnation of the SFO's association with the City might just have easily faded and been lost to the history of the 1980s, had it not been brought into sharp relief by the first two Guinness prosecutions and the Blue Arrow trial (see Chapter V). Guinness and Blue Arrow were reported extensively in the news media. The disproportionate coverage they received not only meant that they came to define the type of case that the SFO generally prosecuted, but also the type of organisation that the SFO itself represented; serving to re-animate its image as the police force of financial professionals and institutions located in the City of London. This image of the SFO has endured, perpetuated by the coverage that Guinness, in particular, has since received long after the conclusion of the original Guinness prosecutions and also by the substantial coverage given more recently to the SFO's investigation into the circumstances surrounding the collapse of Barings Bank. The news media's representation of the SFO as the police force of the City of London does not, however, rest exclusively on its prosecution of financial institutions. On the contrary, the SFO's continuing association with the City owes as much to the news media coverage and interpretation of the SFO's involvement in cases of alleged fraud committed through public companies. The news media's reporting of the Brent Walker case, for example, which was almost invariably described as a 'City fraud' or 'City crime', is a case in point.

The prosecution's central allegation in the Brent Walker case was that George Walker, the Chair and Chief executive of Brent Walker PLC, the leisure and property conglomerate, and a number of other senior executives, had fraudulently enhanced the company's profits which, it was alleged, had the effect of inflating its share price. This effect, the prosecution claimed, was instrumental in the subsequent collapse of Brent Walker's share price, persuading banks to lend heavily to the company, so much so that by the 1990s its bank debts were reputed to be in excess of £2 billion. The case did not feature any major financial organisations located in the City of London, rather the central allegations concerned the activities of the senior executives of a public company and the fraud at once took place within and was realised through that company. Yet, although none of the City of London's major financial organisations were directly implicated in the prosecution, it is still possible to understand why the case was described as a 'City fraud' since the essence of the criminality was the distorting effect that it had on the company's quoted share price. The fraud, in short, although committed through the company, manifested itself in the

company's quoted share price on the International Stock Exchange, one of the City of London's pre-eminent institutions.

Although the alleged fraud at the centre of the Brent Walker case had a clear relation to the City of London, the news media's use of the term 'City fraud' or 'City crime' to describe alleged frauds committed through public companies does not appear to follow a clear pattern. The news media's coverage of the verdicts in the European Leisure case, for example (itself involving an illegal share support operation which was similar although not identical to the one mounted during Guinness' take-over of Distillers) was not described as a 'City fraud', although the first Maxwell prosecution, which simply involved an alleged theft from the Maxwell pension fund, was. Despite these apparent inconsistencies and despite the fact that when the news media casts the SFO in opposition to the City it is sometimes not the City of financial capital but the City of productive capital that underpins the image, the overriding image of the SFO for most of its existence has nonetheless been as the police force of the City of London.

The image of the SFO as an organisation which prosecutes 'City fraud' does, to some extent at least, have its foundations in fact. The SFO does prosecute both financial institutions based in the City of London and what can broadly be described as 'City fraud'. The above statements can therefore simply be interpreted as an acknowledgement of this particular aspect of the SFO's operation. There is no indication in any of them that the SFO only prosecutes 'City fraud'. On the contrary, the media does report SFO investigations and prosecutions which, on any measure, are not cases of 'City fraud' (see for example Hollinger, 1993) and the SFO's Press and Information Office does seek to generate publicity for completed cases which do not involve frauds committed by financial institutions located in the City of London, or which are not, on any measure, cases of 'City fraud'.[15] Moreover, in the speech to the Judge's conference, Staple did emphasise the breadth of cases that the SFO prosecutes. What is significant though, is that second to the description of the SFO as an organisation designed to prosecute serious and complex fraud, a description which at once says everything and nothing about its operation and the type of cases it prosecutes, the image of the SFO as the police force of the City of London predominates.

It is significant first because, as we shall see, it persists despite the fact that the prosecution of financial institutions located in the City of London - the type of case it was widely regarded as having been established to prosecute - constitute only a small percentage of the cases that it has brought to trial. And second, because the prosecution of 'City fraud' (see Appendix II) constitutes a minority of the cases that the SFO prosecutes. It is, in short, an imperfect image - an image which overstates the degree to which the SFO operates against the City of London, an image which is so prevalent, in fact, that it seems as if the news media, and the SFO itself, has been anaesthetised to the reality of its operation. To explain the apparent disjunction between the news media's portrayal of the SFO and the reality of its operation it is first necessary to further explore some aspects of the SFO's representation in the news media.

THE NEWS MEDIA, THE SERIOUS FRAUD OFFICE, CONVICTIONS AND THE TRIAL

THE SERIOUS FRAUD OFFICE'S STATISTICS

As a way of providing a measure of its performance, the SFO releases a variety of statistics each year in its Annual Report. Amongst other things, these record the number of cases that it currently has under investigation, the time taken between the acceptance of a case for investigation and its transfer or committal to the Crown Court, the number of trials it has been responsible for in the past year, the number of defendants proceeded against in those trials and the number of those defendants convicted. These statistics represent the only official measure of the SFO's performance, the only available index of how active it is in terms of investigating and prosecuting commercial fraud. But even in this narrow respect they provide only a partial insight into the SFO's operation. Thus, the following information represents the most important insights we can deduce from the statistics. First, during the first seven years of the SFO's operation, its funding restrictions served to impose a limit on its active caseload - about fifty to sixty cases in a given year (Serious Fraud Office, 1995: 11).[16] Second, the majority of the cases that it accepts for investigation are referred to it not by the SRO's recognised under the Financial Services Act, but by the police and the DTI. Third, the process of constructing cases for prosecution is a time consuming affair. Once a case is accepted for investigation by the SFO, for example, it takes about twenty months on average for it to be committed or transferred to the Crown Court (Serious Fraud Office,

1995: 11). Fourth, the frauds that form the substance of most of its cases are committed against financial institutions, creditors and investors. Fifth, the SFO is relatively active in the courts, being responsible on average for twenty trials a year (Serious Fraud Office, 1995: 14). And finally, the SFO has achieved a moderate amount of success in convicting defendants - about 62 *per cent* of the total number it has taken to trial over the first seven years of its operation (Serious Fraud Office, 1995: 14). Although, the SFO releases other statistics, these do not alter the fact that the figures it does produce only serve to convey a vague impression of how efficiently it carries out its functions[17] and a dim sense of its impact on the social world. In no sense do they communicate an idea of the social distribution or extent of that impact. That is to say, the SFO's statistics provides no detailed information on the type of cases it prosecutes.

Of all the SFO's statistics, its conviction rate - the number of defendants convicted as a percentage of those brought to trial - has come to assume the greatest importance. This is, in part, a result of the SFO's traditional insistence on promoting the figure as the true test of its worth and instrumental significance (see, for example, SG/IC1, 1987).[18] The SFO has, predictably, long attached importance to its conviction rate as the best means of measuring its immediate operational impact (in terms of specific criminal prosecutions) and also its wider impact (in terms of producing a general deterrent effect and promoting investor confidence). John Wood, the first Director of the SFO, for example, stated that if the SFO was able to make the prosecution process more efficient, with the effect of increasing the rate at which serious fraud suspects were convicted, it would:

> 'without doubt, add to the confidence of investors and ultimately discourage those who are now prepared to take risks in the knowledge that an investigation will be so protracted that the chances of conviction are lessened and, in the event of a conviction, a light sentence will ensue.' (Wood, 1989: 178)

What is significant, however, is not that the SFO has traditionally placed an emphasis on its conviction rate, but rather why, from 1993 onwards, it has deliberately organised its public relations strategy to elevate the significance of the figure.[19] To understand this, it is necessary to look beyond its value in securing routine institutional credibility and see the strategy as part of a specific struggle to contain a wave of highly critical coverage in the news media.

THE SERIOUS FRAUD OFFICE'S CONVICTION RATE AND THE DECLINE IN PUBLIC CONFIDENCE

To understand why the SFO has tended to attach greater priority to its conviction rate, it is first necessary to understand some of the basic patterns of the SFO's representation in the news media. Some of the features of this representation have already been considered, most notably the focus on cases involving large companies and financial institutions based in the City of London. There is, however, another feature of the news media's coverage of the SFO which is equally important in appreciating how the SFO is generally understood. This is the fact that most of the coverage of the SFO's cases (with some notable exceptions - such as Asil Nadir's flight to Northern Cyprus) and, therefore the SFO, has centred around the spectacle of the trial.

The SFO and the Significance of the Trial

The news media's focus on the trial is not exclusive to serious fraud investigation and prosecution. As Schlesinger and Tumber have observed, the trial occupies an important symbolic position in the ritual process of restoring social order when any criminal act has been committed. It concludes one of the two key phases (the other being imprisonment) in the process of bringing retribution to those who have broken society's rules as expressed in the law and therefore provides an ideal opportunity for the news media to 'elaborate the implications of a particular crime' (Schlesinger and Tumber, 1994: 231). The symbolic position of the trial in the process of serious fraud prosecution is equally important. Significantly, however, the trial not only occupies a more prominent position in the news media's narrative of serious fraud, but it is also rarely presented in the news media as representing the same thing - the restoration of social order.

How the news media represents a serious fraud trial tends to vary according to five key variables: the type of fraud prosecuted, the companies involved, the previous history of the defendants, the conduct of the trial and its outcome.[20] Of these five variables, the outcome of the trial - the balance of convictions and acquittals and the sentencing of the offender - has proved to be of particular importance to the construction of the trial's significance and therefore the news media's representation of the SFO. Although (as will become clear in the

following chapter) the news media's interpretation of the significance of convictions, acquittals or specific sentences ultimately depends upon the precise characteristics of a case, some general observations can nonetheless be made.

When convictions are returned (and sentences awarded of a severity implied in a long and expensive prosecution), it is not simply 'social' order that is restored, but rather the order of the market and the primacy of the state in the operation of commerce. This was an explicit theme of some of the news media's coverage of the verdicts in both the first Guinness and Blue Arrow trials, despite the fact that the convictions highlighted the deficiencies of self-regulation and threatened to amplify the scale of fraud within the City of London.[21] An article in *The Independent*, for instance, reported that the first Guinness trial had:

> 'made merchant bankers, stockbrokers and others in the City more wary. They not only want to be sure they are acting within the law and the new rule book but want to been seen to be acting within the law.' (Dobie, 1990)

Some reports on the Blue Arrow verdicts, relying on the comments of institutional investors, even suggested that 'the mere fact charges had been brought had changed City practices forever' (Cohen and Waters, 1992; see also Waters and Mason, 1992; but see Griffiths, 1990). Convictions (and appropriate sentences), in other words, generally tend to represent the state's ultimate authority over capital and also its capacity to extend the rule of law into the higher recesses of society and the deeper recesses of capital. As John Hamshire's qualified observation in the *Daily Mail* put it:

> '...no one should entertain too many illusions about the Guinness trial and verdict. It may have shown that rich and powerful men cannot get away with fraud, even complex fraud. But there are still areas of City activity where fraud can be committed with relative impunity.' (Hamshire, 1990)

Similarly, the process involved is not simply retribution for violating the law, but rather retribution for greed or of privilege betrayed. This was the pre-eminent theme of the news media's coverage of the verdicts in the first Guinness trial. A front page article in *The Independent*, taking its cue from the prosecution's construction of events, reported, for

instance, that a 'combination of greed and arrogance' had 'led Saunders and his three co-defendants to step beyond what could legitimately be done in a takeover' (Warner, 1990).

Where defendants are acquitted, on the other hand, (or receive sentences which fail to correspond to the gravity implied in a long and expensive prosecution) the trial takes on another significance. It not only becomes the site in which the failure of serious fraud reform is exposed, but also the platform upon which the flaws in the SFO's operation and strategy are discussed. After a series of acquittals in cases involving large public companies, and against the backdrop of a Cabinet led review into the SFO, the acquittal of George Walker was even presented as signifying the demise of the SFO (see above).

The failure of serious fraud trials has come to occupy a central place in the news media's coverage of the SFO and is arguably the most important reason why trials have become the primary focus of the news media's reporting. However, the prominence of the trial and therefore its importance to the news media's representation of the SFO is not a simple function of trial failure. This is not to say that the acquittal of a defendant is not an important and sometimes necessary condition of the news media's coverage of a specific trial. The case against Andrew Kent and Patrick Mahon of the stockbrokers, TC Coombs, for instance, received little coverage in the news media until the trial judge directed the jury to acquit them.[22] Similarly, one of the major themes in the news media's coverage of the SFO has been the failure of a relatively well-resourced organisation, with special powers of investigation, to achieve what it was ostensibly established to do: to arrest the trend of commercial fraudsters defeating the process of criminalisation. It is simply that the focus of the trial in general and therefore specific trials is also a result of the peculiar characteristics of the SFO and commercial fraud. These peculiar characteristics coalesce to structure the news media's attention on the trial; making the trial the major, as opposed to but one, forum in which serious fraud and the machinations of the criminal process are put on public display.

The important structural feature of the SFO that tends to focus the news media's attention on the trial is that, unlike the police, it has no direct preventative role.[23] Its function is officially confined to investigation and prosecution, leaving the prevention of fraud, as well as detection, to a fragmented arrangement of regulatory organisations which include the police, the DTI and the regulatory apparatus established under the FSA 1986. This, in

combination with the shortage of resources available for public relations at the SFO,[24] imposes an important limitation on the SFO's coverage in the news media, since it means that the generation or receipt of favourable coverage beyond discrete criminal proceedings is virtually impossible. This is not to say that absence of coverage outside of specific cases is wholly due to the structure of the SFO. It is also due, in part, to the communication strategy the SFO has pursued for most of its existence. Before 1995, its public relations strategy was almost exclusively reactive. That is the SFO only tended to respond to requests for information from the news media; requests which almost invariably related to specific cases. The policy changed in 1995, in part because of staff changes at the SFO's Press and Information Office and in part because the SFO's senior management had finally recognised the importance of any suggestion which promised to reverse almost three years of relentless criticism in the news media (SFO/CS, 1995). This led to the SFO attempting to expand the nature of its coverage. In 1997, for instance, the Office publicised a general warning to investors of the dangers of peculiar forms of investment in an attempt to present itself as a centre of useful intelligence as well as a prosecution agency. Nonetheless, the structural limitation on the SFO's coverage remains; standing in marked contrast to the police's ability to generate positive publicity from launching general initiatives against marginalised segments of the population with little or no recourse to justifying the cost, success or even the premise of the operation.[25]

Another reason for the news media's focus on the trial relates to the nature of commercial fraud. To understand why, a comparison with the news media's coverage of a typical conventional crime is instructive. The narrative of the entire episode[26] of a conventional crime spans the crime itself, the investigation (the search for the criminal), arrest, charge, trial and finally the verdict and sentence (Schlesinger and Tumber, 1994: 231). The typical narrative of a serious fraud case is similar, but differs in one important respect. Whereas in the context of conventional crime the commission of a crime is generally assumed as unproblematic, a recurring, and explicitly recognised, theme in the prosecution of serious fraud is whether or not a crime has been committed. Definition is not only unresolved, but recognised as being such. The central question in the drama therefore commonly becomes not so much the identity of the criminal or his or her motivation, but whether a crime has taken place. This has two important effects. First, prior to the involvement of the SFO, news journalists are usually deprived of the opportunity of writing about the event which forms the setting of the fraud (whether it be a rights issue, a take-over, or the collapse of a

company) in terms of a crime. This has the effect of truncating the narrative of a crime in the news media and shifting the emphasis of reporting onto the legal process. It is the trial, however, which receives by far the most coverage, since the unresolved nature of commercial fraud also imposes an important constraint on the SFO's capacity to release details of the alleged fraud. This is because, unlike the police who, with relative freedom, are able to give details of the event and investigation so that their construction of the crime becomes part of the news media's narrative of its course through the criminal process - the dissemination of the details of an alleged commercial fraud is commonly at risk of going to the very issue the jury has to consider.

The danger of prejudicing a subsequent trial, and incurring criticism as a result, has made the SFO reluctant about providing information on the subject, nature and course of its investigations. When the SFO was originally established, for instance, its policy on releasing information on an investigation was to neither confirm or deny that it had accepted a case for investigation unless the fact of acceptance had already entered the 'public domain' (SFO/CS1, 1992). This policy eventually changed,[27] but the information the SFO was prepared to release as a matter of routine was still subject to important limitations. Until March 1995, when a new communications strategy proposing greater openness came into effect, its general response to requests for information relating to on-going investigations was that it did not discuss 'operational details' (SFO/CS1, 1992). As part of the fieldwork involved in this research I was able to observe that between September 1994 and March 1995 the Press and Information Office generally tended to only confirm that it had accepted a case for investigation and, where the news media had already shown an interest, to publicise the fact that suspects had been arrested and, if charged, to publicise the fact together with a list of the charges.[28]

This is not to say that details of an alleged fraud under investigation or information concerning the progress of the investigation were never released. Simply that the nature of commercial fraud tends to force caution on the SFO and that opportunities for journalists to gain access to the progress of an investigation prior to the trial generally tend to be limited. After March 1995, the SFO's restrictive policy on disseminating information during the course of investigations was relaxed.[29] The information released to journalists on the SFO's investigation into the collapse of Barings Bank is a case in point. In this case the SFO took the decision to provide journalists with a relatively detailed account and explanation of its

actions and the progress of its investigation in response to a highly public campaign waged by Nick Leeson's solicitor which was undertaken in the hope of influencing the SFO to extradite Leeson back to the United Kingdom.[30]

An open press policy is, however, vulnerable to criticism. The most notable example of the dangers of courting publicity was the SFO's arrest of the Maxwell brothers which attracted criticism from both Peters and Peters (Kevin Maxwell's solicitors), in Parliament and in the news media, leading the Attorney General's Office to formally request the SFO to explain the circumstances of the arrest (SFO/C1, 1993). The publicity surrounding the Maxwell case, and the SFO's role in generating that publicity, also formed the basis of an abuse of process application. The criticism of the SFO over the arrest of the Maxwell brothers was particularly important in detering the SFO from relaxing the restricted communications policy observed during my fieldwork. One Press and Information Officer, when asked to explain her reluctance to send out a press release publicising the arrest of Asil Nadir's personal assistant, Elizabeth Forsyth, replied that is was because in the past the SFO had 'got criticised for courting publicity - like the Maxwell arrests.'[31] Furthermore, the danger of defendants using the publicity surrounding their case in a future hearing also informed the SFO's public relations. When Abas Gokal was extradited from Germany in connection with the collapse of BCCI, for instance, the timing of the press release of his return to the jurisdiction was delayed in order to ensure that he was not photographed either being arrested or entering Bishopsgate Police Station. As the Senior Information Officer explained:

> 'We would not want to do anything that might aggravate his lawyers or provide a spurious foundation that the prosecution were not acting fairly at some time later in the trial.'[32]

The major source of information released to the news media is therefore a list of the charges. This, however, is not enabling to the process of news construction. Charges are tailored to the demands of the legal process, not to the imperatives of news journalism. The information provided in a list of charges, however extensive, fails to give a detailed explanation of what was done, under what circumstances, and why - precisely the type of information that a news journalist requires in order to write more than a perfunctory account. One news journalist, who was planning on writing a three hundred word article for

The Independent recording the fact that Philippe Le Roux and Peter Horton (the former chief executive and company secretary of the Norton Group, the motorcycle manufacturers) had been charged, phoned up the Press and Information Office for information relating to the alleged offences. He had a copy of the charges in his possession, but explained that this was insufficient to write 'a piece setting out what the defendants had been doing'. The case controller, however, refused to release any information in addition to the charges with the effect that the article was never written.[33]

Although background briefings are sometimes provided in addition to the list of charges, this type of information is rarely volunteered. As one member of the SFO's Press and Information Office put it:

> 'We give very minimal information out in relation to on-going inquiries...We do not discuss individuals.'[34]

Moreover, even where it was possible to release some information in addition to a list of the charges without prejudicing a subsequent hearing, some SFO case controllers showed a marked reluctance to allowing the news media to be given more information than the conventional minimum. The case controller on the MTM PLC (the chemical company) case, for instance, protested vigorously to a press release explaining the circumstances behind the charges against Richard Lines (the former chair and chief executive of the company) and Thomas Baxter (its former finance director). His complaint concerned the additional information contained in the release over and above that contained in the charges; namely that the charges had followed an investigation into 'matters arising from the disclosure of an unexpected loss of £20.5 million in the company's results' leading to 'a collapse in the share price from 290 pence to 25 pence (now 82 pence)' (MTM01/PR1, 1994).[35]

The effect of the news media's focus on the trial has been to reduce public debate on the SFO to its performance in the courts - a debate which since 1992 has taken a highly distinctive form. This is because 1992 was the year that witnessed, in close succession, the gradual disintegration of the Blue Arrow trial and the collapse of the second Guinness trial. These two cases that served to shape the pattern of how the news media would make sense of future SFO trials, as well as informing what was and what was not newsworthy about the SFO. The more dramatic the failure, the more coverage a case and the SFO tended to

receive.[36] The effect of this was to give the overwhelming impression that the majority of the SFO's defendants escaped conviction and it is in this image that we find the origins of the SFO's more recent attempts to promote its conviction rate. In the face of such an emphatic depiction of failure, the only way in which the SFO could challenge the image was to promote its conviction rate - a form of statistical demonstration that it had at least some success at trial.

The significance of this interest in the SFO's performance at trial - its inability to secure convictions in its widely publicised cases on the one hand, and its ability to convict a majority of its defendants as evidenced by its conviction rate on the other - is that it tends to obscure a dimension of the SFO's operation which is, in many respects, far more important to understanding its instrumental impact. Although the conviction rate provides a valuable indication of the SFO's capacity to construct cases against individuals which end in conviction, it gives no insight into the extent to which the SFO has operated against commercial fraud or whether or not it has made a significant impact on the scope of criminal justice intervention against the corporate form. The question therefore remains. Clearly, the SFO is not simply a symbolic institution. It was established to meet a very real demand for the prosecution of commercial fraud. Moreover, it has prosecuted and continues to prosecute cases that involve substantial sums of money,[37] including some of the most celebrated criminal prosecutions of the last decade. But, to what extent does its image as the police force of the City of London and large public companies conform to its operation? To what extent are the Guinness and Blue Arrow prosecutions representative of its general operation? To what extent, in short, did the SFO mark a radical break with the past? To assess this, the number of trials in which the SFO has acted as the prosecution authority is a far more relevant figure.

THE SERIOUS FRAUD OFFICE'S CASES

THE NUMBER OF CASES BROUGHT TO TRIAL BY THE SFO

The SFO's Annual Report for the year ending 4th April 1995 stated that the Office had been responsible for 138 trials between 6th April 1988 and 4th April 1995 (Serious Fraud Office, 1995: 14). This works out to an average of just under 20 trials a year. The use of the trial as index of the extent to which the SFO has expanded the scope of criminal justice

intervention, should, however, be treated with caution. Although it might provide a relatively accurate indication of the total number of trials in which the SFO has acted as the prosecution authority,[38] it does not represent a faithful reflection of the number of separate cases of commercial fraud that it brought to trial between 1988 and 1995.

The reason for this is that the basic unit used for the calculation, the trial, is essentially a legal concept, delineated by the law of procedure, rather than by the nature of the case that forms the basis of the trial.[39] One effect of using the trial as the basis of calculation, for example, is that a single case transferred to the Crown Court and allowed to proceed on a single indictment, can be counted as a number of separate trials if the indictment is later severed so as to produce a number of separate indictments. The Guinness case illustrates this effect perfectly. After two rulings to sever the indictment during the preparatory hearings,[40] the case came to be split into three separate trials. This, incidentally, does not account for the full number of trials to emerge from the Guinness investigation. A fourth defendant, Thomas Ward, was tried in 1993 (*R v Thomas Ward*, 1993), after having been absent from the jurisdiction when the case against the first seven defendants was originally transferred to the Crown Court. The Guinness case, as such, is recorded as four separate trials in the SFO's statistics, even though the criminal activity alleged in each trial directly related to the same event and was, so the prosecution contended, committed to achieve the same end - Guinness's take-over of Distillers in 1985.[41]

Another effect of using the trial as the basic unit of calculation is illustrated by the way that the Levitt case (see Chapter VI) is recorded in the SFO's statistics. In this case, one of the defendants, Alan McNamara, continued to plead not guilty to an amended charge of fraudulent trading that he had originally been arraigned on with his co-defendants Roger Levitt, Robert Price and Mark Reed. Levitt and Reed pleaded guilty, and Price was acquitted on the direction of the trial judge, which left the question of how to proceed against McNamara. In the event, after the judge had discharged the jury from returning a verdict against McNamara on the fraudulent trading charge, the prosecution preferred a new indictment containing a single charge of recklessly furnishing false and misleading information contrary to s.200(1)(b) of the Financial Services Act 1986. The fact that a new indictment was preferred, and McNamara pleaded guilty to it, meant that the case was recorded in the statistics as two trials.

Not all related cases (as Ward's route through the legal process demonstrates) are transferred or committed to trial as a single case. The four prosecutions to emerge from the collapse of BCCI during the period under discussion, for instance, were proceeded with as discrete trials and therefore counted as four separate cases in the SFO's statistics. However, simply because these trials were related to the collapse of BCCI, does not mean that they should be measured as one case in this study. Two of the SFO's prosecutions in respect of BCCI concerned the role that the bank's customers had played in artificially inflating the profits of the bank which eventually led to its collapse.[42] The other two concerned staff within the bank. There is argument to include all of these cases as one case, since they all effectively served the same end - inflating BCCI's assets and profits. However, since the frauds committed by its customers also served the ends of those customers - cheap loans - its seems more accurate to count them as separate cases.

The way that the Guinness, Levitt and BCCI cases are recorded in the SFO's official statistics are just three of a number of examples which illustrate how the shape of a trial at the Crown Court - in terms of who is tried, when they are tried and what they are tried for - is determined as much by the strategic imperatives of the prosecution, the demands of legal procedure and the perceived limitations of the trial process, as it is by the nature of the fraud that forms the basis of the trial. As a consequence, the number of trials that the SFO prosecutes always tends to be greater than the number of specific cases of fraud that it brings to court.

Another effect of using the trial as the basic unit of calculation is that prosecutions under sections 2(13), 2(14) and 2(16) of the Criminal Justice Act of 1987 are also included in the SFO's statistics. Whilst these might constitute separate trials, they are not trials that involve allegations of commercial fraud, rather they arise out of a person's failure to comply with a requirement imposed on him (or her) under section 2 of the 1987 Act.[43] During the period under investigation, the SFO brought seven such prosecutions to trial. In all, the fact that the SFO's statistics measure the trials that it has been responsible for, rather than the cases of commercial fraud that it has prosecuted, tends to exaggerate the degree to which the SFO takes cases of commercial fraud to trial. If the figures are recalculated on the basis of separate cases of commercial fraud, as opposed to separate trials, the figure drops from 138 to 105 cases - an average of 15 cases a year.[44]

ORGANISATIONAL OR ORGANISED FRAUD

The Significance of Organisational Fraud

This analysis of the SFO's cases is not simply concerned with the number of the SFO's cases, but rather how these correspond to the SFO's depiction in the news media as the police force of the City - as an organisation which in systematically prosecuting organisations representative of power marks a break with the past.

One of the first steps in assessing the extent to which the SFO prosecutes social entities which represent economic power is to make a distinction between organisational frauds, organised frauds and individual frauds, or, in other words, frauds committed through organisations, frauds committed by groups of individuals acting independently of an organisation, and frauds committed by individuals, again acting independently of an organisation.

The distinction is important because all major forms of economic activity in society take place within organisations, or more specifically within the corporate form, particularly the public or 'joint-stock' company (Scott, 1979: 15-17). The power that commercial organisations can exercise is not simply confined to the markets in which they operate, or the employees who work under their control. Commercial organisations occupy a strategic position within society and exercise a pervasive and permanent pressure upon the state. As Milliband observed in 1969 (although his observation remains just as relevant today):

> 'The existence of this major area of independent economic power is a fact which no government, whatever its inclinations, can ignore in the determination of its policies not only in regard to economic matters, but to most other matters as well.' (Milliband, 1969: 147)

This is not to ignore that commercial organisations vary considerably both in size and in their respective capacities to exercise economic and political power. The difference between smaller limited and larger public companies in these respects is immense. Nor is it to claim that their interests are uniform. Although as Milliband put it, commercial organisations might be said to be 'tactically divided', but they tend to be strategically cohesive (Milliband, 1969: 157). It is simply to justify the concept of the commercial organisation and therefore organisational fraud as an important starting point in an analysis of the extent to which the SFO has prosecuted sites of economic and political influence.

A Definition of Organisational Fraud

Although no one has yet formulated a definition of organisational fraud, the concept of organisational crime has been used by criminologists for a number of years (see, for example, Box, 1983). The classic definition of organisational crime is found in Schrager and Short's essay, *Towards a Sociology of Organizational Crime*. This defines the concept as:

> 'an illegal act of omission or commission of an individual or group of individuals in a legitimate formal organization in accordance with the operative goals of the organization which have a serious physical or economic impact on employees, consumers or the general public' (Schrager and Short, 1977: 407).

As a definition, Schrager and Short's concept of organisational crime provides a useful starting point for categorising the SFO's cases. A number of modifications must be made to it, however, if it is to serve as a meaningful guide to the SFO's cases. To begin with, it must be adapted to take into account the specific characteristics of the social phenomena that the SFO is legally sanctioned to prosecute - criminal fraud. Criminal fraud, however, does not exist independently of the legal process. It is ultimately a social construction which only really comes into existence once the architects of the crime have been convicted at the conclusion of the criminal process. Thus, to classify all the cases that the SFO has prosecuted it is necessary to tailor Schrager and Short's definition so that it accommodates those cases which are prosecuted, but which do not end in a conviction - where, according to the law, no criminal fraud exists - as well as those cases which do conclude in a conviction. This also has the effect of focusing the definition on the SFO's construction of cases - its interpretation of the principal defendants and victims.[45] To this effect, it is necessary to redefine the 'illegal act' in Schrager and Short's definition as an alleged criminal act of commission or omission.

In addition to this, Schrager and Short's definition must also be modified to accommodate the differences between the general nature of criminal fraud and other criminal offences. The primary distinguishing characteristics of criminal fraud at law relate to the nature of its impact and who it effects. The impact of fraud, if it is restricted to its direct legal effects, is

invariably economic rather than physical.[46] Thus, for the purposes of this inquiry, an organisational fraud is one which has a serious economic impact, rather than both an economic and physical impact. Likewise, if we limit ourselves to the direct legal effects of fraud,[47] the victims of fraud are those organisations and individuals which suffer some legally recognised financial loss as a result of the actions of the commercial organisation or organisations at the centre of the fraud. Thus, an organisational fraud is an illegal act which has a serious economic impact on shareholders, employees (usually as beneficiaries of company pension funds), consumers, investors, creditors and other corporations (either as investors, consumers, creditors or shareholders).

Another aspect of the definition that needs to be addressed is the concept of the 'legitimate formal organization'. There are essentially two ways of interpreting the meaning of 'legitimate' as it is used here. The first is to regard it as a way of describing an organisation which is formally recognised in law, such as a company which has been incorporated and registered in accordance with the demands of company law. The second way is to regard the term as requiring the organisation to have some legitimate commercial purpose beyond the illegality alleged. This second interpretation causes a major problem when it is applied to some of the cases that the SFO has prosecuted. On the one hand, where the fraud concerns a particular episode in the trading life of a company, which otherwise operates within the law, it seems eminently reasonable to describe that company as a legitimate formal organisation. The European Leisure case illustrates this point well (*R v Michael Ward and others*, 1995). In this case, the core businesses of European Leisure PLC - pubs, clubs and restaurants - had presumably been run legitimately throughout Michael Ward's stewardship (the chief executive officer of the company), including the period of its bid for Midsummer Leisure, which formed the subject of the SFO's prosecution, and it was only the secret purchase of shares in European Leisure by Ward and his co-defendants that were claimed to have constituted a criminal offence.

On the other hand, however, where the fraud engulfs the entire operation of a company - where the essence of its operation is fraudulent and the company is only able to exist because it is being run fraudulently - is it right to describe it as legitimate, in the sense that it has a legitimate commercial purpose beyond the illegality alleged? The general type of cases that best exemplify this particular problem are investment frauds such as the Barlow Clowes and Natrocom cases. In both of these cases the companies in question solicited

money from the public on the basis that it would be invested securely when, in fact, it was misappropriated and either channelled into a variety of 'speculative investments',[48] or simply squandered to fund the principal defendant's own lavish lifestyle. Clearly, there is no significant legitimate underlying commercial purpose in either of these cases - all but a very small proportion of the funds invested were misappropriated and put to uses other than that expressly represented by the commercial organisations in question. Does that mean, however, that neither Barlow Clowes nor the Natrocom case are organisational frauds?

The criminality alleged in the Barlow Clowes case, at least, was certainly designed to enable the Barlow Clowes group of companies to continue trading. In fact, if the Barlow Clowes group had not advertised that clients' money would be invested in gilts with the guarantee of a rate of return marginally higher than that obtainable from a building society, the company, according to the prosecution at least, would not have grown as spectacularly as it did (BC01/TT, 1991). As such, there is clearly an organisation in this case which has committed a fraud to continue trading, one of the primary aims, if not the primary aim, of an active commercial organisation. Thus, although it appears to fall within the type of behaviour that the definition of organisational crime attempts to capture - the illegality alleged is committed through the organisation in accordance with one of its operative goals - the definition, as it stands, does not necessarily recognise it as such. A way of circumscribing the problem is to substitute the words 'legally recognised' for 'legitimate'. This has the effect of removing any ambiguity caused by using the word legitimate, thereby including cases within the definition of organisational fraud where the organisation in question appears to offer a legitimate service or appears to be engaged in a legitimate business, when in fact no such legitimate business is being undertaken.

Two further aspects which need to be considered are the requirements for the illegal act to be committed by an individual or group of individuals *in* an organisation and for the illegal act to be committed 'in accordance with the operative goals of the organisation'. To illustrate these points, let us explore the following case against James Mudie (the McGuire McKintosh case).

On 3rd April 1995, James Mudie, a bankrupt with two previous convictions for fraudulent trading, was convicted at Bristol Crown Court of three offences relating to his involvement and use of a company called Rehab Systems Ltd. (Rehab). Rehab had begun life as a prison

project which Mudie had helped to develop whilst serving the latter part of a sentence for fraudulent trading in Leyhill Open Prison. The aim of the project was to help the disabled improve their mobility and general quality of life through the use of computers. Ron Fields, one of the inmates who had worked with Mudie on Rehab, continued to work on the project after his release in April 1991 and soon afterwards the Rehab project was transformed into a limited company, Rehab Systems Ltd., with Mudie, who was released some weeks later, as the company secretary. Fields later withdrew from the project, allowing Mudie to assume exclusive control over Rehab and appoint himself a director of the company (which he did on 16th July 1991). The case against Mudie effectively fell into two parts. The first limb of the case solely concerned Mudie's status and his role in Rehab. In addition to being a bankrupt, Mudie was also subject to a disqualification order under section 2 of the Company Directors Disqualification Act of 1986 which prohibited him from taking part in the promotion, formation and management of a company until 25th July 1998, the date the order was due to expire. The prosecution claimed that by participating in the formation and management of Rehab, Mudie was in breach of sections 11 and 13 of the 1986 Act. The other arm of the case, the part that is important to illustrating the point I want to address, concerned a mortgage advance for £63,500 which Mudie had obtained from Birmingham Midshires Building Society. The application for the mortgage was false in a number of respects. Mudie lied about his age, his criminal past and the fact that he was an undischarged bankrupt, but he also used Rehab to lie about his employment and his income, claiming that he was a manager of the computing division of the company for which he had received a basic salary of £25,750 *per annum*. Rehab, it seems, did absolutely no business and the only purpose it served, its operational goal in other words, was to cloak Mudie in respectability and enable him to obtain the mortgage. For obtaining the mortgage advance with a false application, Mudie was charged with obtaining property by deception contrary to section 15 of the Theft Act 1968.

In the above example Mudie applied for the mortgage in a personal capacity, rather than on behalf of Rehab and, as such, although he used Rehab to commit a fraud, he did not commit the fraud through Rehab. Schrager and Short's definition does not allow for this distinction. It might demand that the illegal act is committed by 'an individual or group of individuals *in* [an]...organisation', which in turn might suggest that the individuals in question should have some relation to the organisation, but it does not specify the terms of that relation. When precisely is an individual or a group of individuals *in* an organisation? A way of giving

greater clarity to the definition would be to change it so that it reads, 'an individual or group of individuals working through [an]..organisation.' This would require the illegal act to be committed by the individuals in question whilst they are, ostensibly at least, working on behalf of the organisation. This has the benefit of providing a clear idea of how the individuals should relate to the organisation, whilst, at the same time, preserving the organisation's central position in the definition.

Whilst this alteration gives a more definite sense of how the organisation is positioned in relation to the illegal act, it fails to recognise how chief executive officers working in small to medium sized commercial organisations tend to do business. Take the Levitt case, for example (see chapter VI). In that case the prosecution alleged that Roger Levitt, who was both the Chief Executive and a major shareholder in the Levitt Group PLC, had obtained a number of bank loans by deception. The loans were obtained in a personal capacity, but the loan facilities were only advanced on the strength of Levitt's shareholding in the Levitt Group and his assurances that the business was operating profitably. Moreover, the prosecution alleged that Levitt had obtained the loans in order to drip feed the sums advanced into the Levitt Group which, at the time, was technically insolvent. Clearly, Levitt did not commit the alleged illegal act through the company. He did, however, commit the act to keep the company afloat - his act, in other words was, in fact, committed on behalf of the organisation - and his relation to the company was instrumental in obtaining the loan and, thus, committing the act. Thus, although in practice Levitt was working, according to the prosecution at least, on behalf of the Levitt Group, he was not ostensibly working either through or on behalf of the company. Not to include Levitt's actions within the definition of organisational fraud would seem to contradict the purpose of the definition - to capture alleged illegal acts which, in actual fact, are committed through organisations. To ensure that cases like Levitt are included in the definition it is necessary to substitute the word 'in' for, 'who are either ostensibly or in practice working on behalf of the company'.

This modification to the definition would exclude the Mudie case from the definition of organisational fraud, but there is another feature which must be addressed. This is that Rehab Systems, the only commercial organisation involved in the case, had no underlying commercial purpose - it did not trade in goods or services, it did not produce anything, it did not, in short, engage in any form of commercial business, legitimate or otherwise. According to the prosecution, the only purpose the company served, the only operative goal

of the company, ostensible or otherwise in short, was to commit a fraud. Thus, strictly speaking, with the assistance of an organisation, Rehab Systems, Mudie committed an illegal act in accordance with the operative goal of that organisation. However, defining this case as an organisational fraud seems to miss the essence of the type of illegality that the concept of organisational crime was designed to capture. The definition was not simply designed to encompass illegal acts committed through, in or with the assistance of organisations, but more illegal acts committed in pursuit of a goal of an organisation which at the very least pursues an objective with an ostensibly legitimate underlying commercial purpose.

The final aspect of Schrager and Short's definition which demands closer attention concerns the role of the commercial organisation in the prosecution's reconstruction of a particular fraud. Schrager and Short's concept refers to 'an individual or group of individuals in a legitimate formal organisation'. The problem with this particular aspect of their definition is that it does not readily correspond to the way in which I have framed the question of the pattern of the SFO's impact on the social world. Throughout the foregoing discussion I have referred to the prosecution of commercial organisations, talked about the SFO as an instrument of commercial fraud control which mobilises the criminal law to regulate the commercial form, and stressed the importance of exploring the extent to which the SFO prosecutes companies, financial institutions, concentrated sites of capital and social entities representing economic power. Thus far, in other words, I have conflated the question of the extent to which the SFO operates against economic power with its prosecution of 'otherwise' legitimate commercial organisations. Schrager and Short's definition, on the other hand, not only embraces a distinction between the organisation and the individuals who work within it, but also maintains that any person in a legitimate formal organisation can commit an organisational crime provided the illegal act is committed 'in accordance with the operative goals of the organisation'. The question is whether it is possible to retain this distinction, whilst at the same time constructing a definition which provides a basis for measuring the extent to which the SFO operates against social entities representing economic power.

The retention of the distinction is important because, although the SFO frequently prosecutes senior company directors for committing fraud through the commercial form, the commercial form itself rarely forms the explicit object of criminal prosecutions. Between

1988 and 1995, companies only accounted for six (or less than 2 *per cent*) of the three hundred and twelve defendants that the SFO brought to trial. Even this figure tends to overstate the extent to which the SFO prosecutes companies. Of the six companies prosecuted, three were defendants in the Marconi trial in 1990, the other three being defendants in the Blue Arrow trial which concluded in February 1992. As a percentage of the total number of trials that the SFO has been responsible for that is just over 1.5 *per cent*. Moreover, it is unlikely the number of companies prosecuted by the SFO will increase in the future, since the SFO's present prosecution policy is to avoid prosecuting companies even where the evidence justifies it (SFO/WM1, 1995). This raises an important issue in respect of modifying Schrager and Short's definition to allow for the way in which the question of the SFO's impact on the social world has, thus far, been framed. Since, to measure the extent to which the SFO operates against social entities representing economic power on the basis of those cases in which the corporation has formed the explicit object of the prosecution produces a highly contrived result, based on the legal definition of corporate responsibility and the SFO's prosecution policy (Wells, 1993). The important question is therefore this: should the definition of organisational fraud be modified to recognise the position of commercial organisations in criminal prosecutions and, if so, how?

Since the nominal object of the SFO's prosecutions are individuals, rather than companies, is it still accurate to claim that the Office operates against the corporate form? The answer to this is highly problematic. The law recognises corporations or companies as discrete legal entities, separate from its shareholders and management (Stokes, 1994). Thus, in legal terms the commercial organisation and the individuals within it are distinct. What is important, however, is the practical extent to which the commercial organisation is distinct from its senior directors.

One way of addressing this question is to look at the degree of separation between ownership and control. Although the corporation is greater than the sum of its parts, where ownership and control coincide in the chief executive officer of a particular company he or she is, in essence, the corporation. In many of the SFO's prosecutions against chief executive officers alleged to have committed offences through private limited companies the distinction between the host company and the defendants (its chief executive officer and senior executive officers) is far less marked than the legal distinction suggests since the defendants commonly own a majority stake in the company.[49] Of the 53 cases the SFO

brought to trial (between 1988 and 1995) against senior executive directors alleged to have committed fraud through a private limited company, in 50 of them (just over 94 *per* cent) the directors proceeded against owned the majority of the company. The nominal subject of the SFO's prosecutions, in other words, might generally be chief executive officers, but the vast majority of those chief officers not only control the companies through which the fraud has been committed (to advance the objectives of the corporation), but are also, in effect, the *alter ego* of the company.

Where a private limited company is identified as the medium of fraud, in other words, the company is generally an extension of its senior executive directors. This observation, however, is not of less general application where the commercial organisation involved is a public limited company. The separation of ownership and control in these cases tends to be greater (Stokes, 1994: 95-96), although not in all cases and not as great as might first be thought. Out of all the organisational frauds committed through public limited companies brought to trial by the SFO between 1988 and 1995, the chief executive officer proceeded against held a majority shareholding in just over 20 *per cent*, and the largest shareholding in just over 70 *per cent* [see Appendix II, Table 5(b)]. Nonetheless, it remains the case that chief executive officers of public companies prosecuted by the SFO are far less likely to own a majority stake in those companies than their counterparts in public limited companies. This, however, does not necessarily mean that senior executive officers cannot be identified with the companies they control.

As Stokes has observed, the legal model of the company which gained currency in the twentieth century viewed the board of directors as an organ of the company which 'for many purposes could be treated as the organ of the company' (Stokes, 1994: 87). Thus, even in law, the board of directors at least, is sometimes regarded as synonymous with the company. The problem with this, however, is that in many of the SFO's cases involving organisational fraud committed through public limited companies, it is only the chief executive, or the chief executive working in conjunction with other senior directors, who is accused of having committed any offences. In the Brent Walker case, for instance, the board of directors actually referred the alleged fraud to the SFO, leaving only George Walker, the chair and chief executive, and Wilfred Aquillina, the financial controller of the company, as defendants in the eventual trial (*R v George Walker and others*, 1994). A further complication arises in the context of the Guinness case where, in the first trial, Ernest

Saunders was both convicted of a fraud against the company, in contravention of the authority of the board, and through the company to further the interests of Guinness in its take-over of Distillers (*R v Ernest Saunders and others*, 1990). However, although the chief executive of a company may not wield absolute control, he or she is almost invariably the most powerful employee in the corporation (at least in the context of the SFO's cases) and for all intents and purposes can be considered as a personification of the company. The SFO might not generally prosecute companies, but it does take cases to trial on the basis of how those companies have been operated by their key and most senior employee.

The commercial form might not be the explicit subject of serious fraud trials, but its operation is commonly the implicit subject of the prosecutions that the SFO has brought to trial. Where the chief executive officer of a company, either working alone or in conjunction with other individuals (who may or may not be senior executive officers), is using the company as a vehicle for fraud in a way that advances the commercial objectives of that company, then it seems reasonable to conclude that the SFO is essentially prosecuting the commercial form. This requires the words 'including the chief executive officer' to be added to the phrase 'by an individual or group of individuals' in Schrager and Short's definition.

Thus, an organisational fraud for the purposes of this analysis is:

> an alleged criminal act of omission or commission by an individual or group of individuals, including the chief executive officer, in a legally recognised formal organisation, which at the very least pursues an objective with an ostensibly legitimate underlying commercial purpose, in accordance with the operative goals of the organisation which has a serious economic impact on shareholders, employees (usually as beneficiaries of company pension funds), consumers, investors, creditors, the general public, and other corporations (which might be investors, consumers or creditors).

THE TYPE OF CASES THE SFO HAS PROSECUTED[50]

If, applying the above definition, the number of related cases of alleged fraud prosecuted by the SFO involving individuals or groups of individuals operating outside of a commercial organisation or junior employees operating through a commercial organisation are subtracted from the related cases of commercial fraud that it has brought to trial, we find

that the number drops from 104 to 68 related cases - or just under 10 related cases of organisational fraud a year (See Appendix II, Table 4).

Already we are beginning to gain a sense of how marginal the SFO's impact has been in terms of extending the scope of criminal justice intervention against social entities that represent and exercise economic power. However, although the corporate form, personified in its chief executive officers,[51] has only formed the subject of 68 cases brought to trial by the SFO during the seven year period under consideration, even this figure not only tends to exaggerate the extent to which the SFO has prosecuted companies representing economic power, but also the SFO's representation in the news media as the police force of the City.

Of all the cases of organisational fraud prosecuted by the SFO (which include frauds committed through public limited companies, private limited companies and partnerships) only a minority involve public limited companies and financial institutions based in the City of London - the type of cases the SFO is most commonly associated with in the news media. If we simply take those cases of organisational fraud committed through public limited companies (excluding those cases committed through private limited companies which are wholly owned subsidiaries of a public limited company), for instance, only 11 were brought to trial during the period under consideration, less than 2 *per annum*. Even if we add those cases of organisational fraud committed through wholly owned subsidiaries of a public limited company the figure only rises to 14 [see Annex III, Tables 4 and 5(a)].

The relevant figure for organisational frauds committed through financial service companies based in or around the City of London is higher, amounting to 15. This, however, fails to make a significant impact on the SFO's record for prosecuting cases which involve social entities commonly associated with economic power. Since, if we add the figure to the number of cases of organisational fraud involving public limited companies (accounting for the relevant overlap between the two figures), the combined total only amounts to 24, or just over 3 *per annum*; a figure which is just over a third of the number of organisational frauds, a quarter of the number of related cases of fraud, and just under a fifth of the total number of cases the SFO brought to trial in the first seven years of its existence.

A BREAK WITH THE PAST?

One of the central themes of the last chapter and the introduction to this chapter was that, as a consequence of the circumstances of its creation and through its depiction in the news media, the SFO came to be associated with a particular type of case and cast in a specific role. The SFO, according to this image, is the police force of the City of London - a well-resourced and powerful institution which exists principally, if not exclusively, to prosecute cases involving large commercial organisations and financial institutions based in the City of London. An examination of the SFO's cases reveals that this image, the image of the SFO which has predominated for most of its existence, is at best an exaggeration, at worst a distortion of its true operation.

This is not to say, however, that the SFO is merely a symbolic organisation, nor that it had failed to arrest the systematic failure of criminal justice to prosecute cases involving 'otherwise' legitimate companies. Although it is impossible to state with certainty from the available evidence, the SFO does appear to have marked a break with the past, albeit not such as radical departure as its representation in the news media might otherwise suggest. It has made a significant contribution to an expansion in the scope of criminal justice intervention in two important respects.

The first concerns a general increase in the number of cases of commercial fraud brought to trial. It seems reasonable to attribute this to the SFO. Since, in supplementing rather than replacing the existing infrastructure of commercial fraud prosecution, the cases it has prosecuted represent an increase on the number of cases which would otherwise have been prosecuted if it did not exist. Although the SFO's contribution to increasing the number of cases brought before the criminal courts appears insubstantial in terms of the discrete cases it has prosecuted, it does prosecute some of the most complicated cases which require the greatest input of resources (The Review Team, 1994). This tends to lift a considerable burden from the Fraud Divisions within the CPS with the effect of increasing its capacity to prosecute more cases.

The second concerns a more significant expansion in criminal justice intervention. Its proven capacity to prosecute organisational fraud on a regular, if infrequent, basis tends to suggest that there has been some increase in the number of 'otherwise' legitimate companies subjected to prosecution. Amongst these cases of organisational fraud are cases involving public limited companies and financial companies based in the City of London. Moreover,

the SFO has had some success in securing convictions in cases involving companies representing economic power. Although only 19 of the 69 defendants (28 *per cent*) tried in cases of organisational fraud involving public limited companies were convicted, the SFO did secure the prosecution of 9 of the 14 chief executive officers (64 *per cent*).[52] Thus, in addition to increasing the prosecution of 'otherwise' legitimate companies, and also 'otherwise' legitimate companies representative of economic power, the SFO also seems to have extended the reach of the criminal law in these cases in terms of securing convictions.

This apparent success requires two important qualifications. As we saw at the beginning of the chapter, the SFO's representation in the news media is such that it has tended to be associated with the prosecution of commercial organisation representing power. However, not only has the SFO rarely prosecuted cases of fraud committed through companies, but most of the companies suggestive of economic power - public companies and financial institutions located in the City of London - were small and not truly representative of economic power. Most of the financial service companies, for instance, were only either small licensed dealers in securities or small investment management firms. Only Alexander Howden, the Lloyd's insurance broker, BCCI, the clearing bank, and The Levitt Group (Holdings) PLC could really be described as sizeable financial companies. Even some of the public limited companies, although large according to the relevant provisions of the Companies Act 1985,[53] were not large in terms of public companies. Only Guinness PLC, Marconi Company Limited (Marconi PLC), Barlow Clowes (James Ferguson Holdings PLC), Natwest Investment Bank Limited (The National Westminster Bank PLC), Polly Peck International PLC, Brent Walker PLC, and European Leisure PLC can only really be regarded as medium sized to large public companies.

Moreover, not only have most of the SFO's prosecutions involved smaller to medium sized economic units, but most of the companies it has prosecuted are even less representative of economic power. This is because most had either been wound up or placed into administrative receivership either immediately before or shortly after the SFO came to investigate. In fact in 56 of the 68 cases of organisational fraud prosecuted by the SFO - over 82 *per cent* - the commercial organisation through which the fraud was committed had gone into liquidation or administrative receivership (or bankruptcy where the commercial form involved was a partnership). Although there is no systematic evidence on whether or not insolvent companies, when prosecuted, were almost the exclusive subject of criminal

prosecution before the SFO formally came into operation, the most prominent cases (such as the Norton Warburg Group, the investment management firm, and Halliday Simpson, the stock-broking firm) did become insolvent as a result of the alleged fraud. Thus, in this respect the SFO does not seem to have greatly expanded the scope of commercial fraud prosecution. In fact, if the SFO has ever been a tool capable of censuring commercial organisations, then its role seems to have been primarily that of censuring commercial failure (Sumner, 1990).

The two major exceptions to this, and by far the most exceptional cases prosecuted by the SFO, were the Guinness and Blue Arrow cases which involved large public companies that continued to trade profitably despite having been involved in an alleged fraud. These two cases now fall to be discussed in the following chapter.

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[1] The arguments made under this sub-heading have largely been adapted from the following three sources which consider the expressive and symbolic functions of punishment: David Garland's *Punishment and Modern Society* (Garland, 1990); Joel Feinburg's *Doing and Deserving* (Feinberg, 1970); and Paul Hirst's *Law, Socialism and Democracy* (Hirst, 1986).

[2] Section 1(3) of the Criminal Justice Act of 1987 states that the 'Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious and complex fraud.'

[3] See for example Goodhart, 1988 and Gower, 1988: 15.

[4] Such as the London International Financial Futures and Options Exchange, the London Commodity Exchange and the Stock Exchange.

[5] This, he claimed, included the traditional British commercial and clearing banks, the merchant banks, and the hundreds of foreign banks which use London as a base for their international money-lending activities (Hilton, 1987: 2).

[6] Some pockets of resistance still remain. Perhaps the most notable critic of the City is Will Hutton, the economics editor of *The Guardian*, who before becoming the editor of *The Observer* wrote extensively about the City's damaging impact on the British economy. A comprehensive account of his ideas can be found in *The State We're In* (Hutton, 1995).

[7] The structural basis of the power of financial capital need not concern here, but Laurence Harris's study on the financial system in the UK provides a compelling account of the subject. He argues that the power of financial capital ultimately originates in the specialised and distinct position that it occupies in the economy; a position which is so distinct that irrespective of the differences between different financial institutions they are secondary compared to the differences between financial institutions on the one hand and enterprise in industry or agriculture on the other. According to Harris, the defining feature of this special position is that financial institutions control mobile blocs of capital which, although part of the interlocking circuits of

capital throughout the entire economy and a necessary pre-condition of the accumulation of profit in industrial and other enterprises, are ultimately distinct from productive and commodity capital. It is in this distinct but symbiotic relationship with other forms of capital that the potential power of financial institutions over other enterprises finds its expression. Although Harris acknowledges that, in principle, the other sectors of the economy have the potential to exercise power over financial capital, he persuasively argues that the characteristics of each, and in particular the mobility and international dimension of financial capital, are such that the potential power of financial capital is, in fact, dominant (Harris, 1988: 7-35).

[8] The Conservative Party Election Manifesto of 1979 claimed, for example, that:

'The most disturbing threat to our freedom and security is the growing disrespect for the rule of law. In government as in opposition, Labour have undermined it...' (Conservative Party, 1979).

[9] Albeit one which was exercised within a statutory framework (see *ante*).

[10] Of course, criminal justice only constitutes the most coercive medium of control available to the State provided it is sufficiently equipped to achieve the desired objective. Historically, the military have been mobilised in support of the civil power where the conventional organisations of criminal justice have proved inadequate to the task of securing public order (see for example Kettle, 1980: 33; and Bunyan, 1979).

[11] The power of transfer - which allows committal proceedings to be dispensed with and a case removed to the Crown Court before the start of committal proceedings - is not exclusive to the SFO. Section 4(2) of the Criminal Justice Act 1987 grants the power to serve a Notice of Transfer to a number of 'designated authorities'; namely, the Director of the SFO, the DPP, the Commissioners of Inland Revenue, the Commissioners of Customs and Excise and the Secretary of State. Section 4(1)(b)(ii) of the Act, however, restricts the exercise of the power to those cases where the 'designated authority' is of the opinion that 'the evidence reveals a cases of fraud of such seriousness and complexity that it is appropriate that the management of the case should, without delay, be taken over by the Crown Court.' The enactment of the power in the Criminal Justice Act of 1987, the enabling Act of the SFO, and the fact that as a proportion of cases taken to trial the SFO uses the power more than any other body, has meant that the it has primarily become identified with the SFO.

[12] Furthermore, in another speech presented earlier that year at a conference organised by Wilde Sapte, the City solicitors firm, in 1994, he stated that:

'Our system of regulation and the investigation and prosecution of serious fraud are founded on the twin axis of the Financial Services Act 1986 and the Criminal Justice Act 1987' (Staple, 1994b).

[13] The Davie Report was a Cabinet led Review of the SFO's operation which, amongst other things, recommended that the Office increase the proportion of provincial cases that it accepted for investigation (Davie, 1995: 45).

[14] The present Director of the SFO who replaced George Staple in 1997.

[15] This was evident from my fieldwork. An example of a conviction publicised by the Press and Information Office which was not on any measure a 'City fraud' was the case against Neil Bradshaw who was convicted on 29th May 1995 (*R v Neil Bradshaw*, 1995).

[16] This has since risen to one hundred cases (Serious Fraud Office, 1997).

[17] Even though, ironically, the only meaningful way of assessing that efficiency is to compare it with the SFO's past performance (but see the Report of the Review Team, 1994).

[18] The SFO has, since its inception, always regarded its conviction rate as one of its two main performance indicators (Review Team, 1994: Annex 4 at 28).

[19] Personal Communication with an Information Officer in the Press and Information Office at the SFO, September 4th 1994.

[20] These variables were derived from a systematic analysis of newspaper cuttings between 1990 and 1995.

[21] This concern was reflected in an article in *The Independent* during the aftermath of the first Guinness case which, in summarising the comments of Christopher Sporberg, of Hambros Bank, recorded that 'while the events were unfortunate one should not conclude that the policing of the City was in chaos or that his type of activity was common' (Pienaar and Chote, 1990; also see Brummer, 1990).

[22] On the comparatively extensive coverage in the national press see Durman, 1993; Cohen 1993; Mackay, 1993 and Kane, 1993).

[23] The SFO does claim to fulfil a valuable role in preventing fraud in creating a deterrence through investigation and prosecution (see Wood above). Although impossible to measure, prevention through prosecution is far more indirect.

[24] Since its establishment the SFO has only had two information officers working in its Press and Information Office (supported at first by one and then two auxiliary staff).

[25] For an example see the news media's coverage of Operation Eagle Eye. The prior construction of the population as criminogenic and therefore a permanent risk to respectable society, together with news journalist's reliance on the police for information (see Chibnall, 1977; Schlesinger and Tumber, 1994: 106-132 and 160-182), seems to be sufficient to realise suspension of professional scepticism and criticism. The problems involved in marginalising specific companies or forms of investment tend to impose a fundamental limitation on the capacity of the apparatus of financial and commercial regulation to undertake a similar programme of fraud prevention. The DTI has had some success to this effect. The series of applications to the High Court for winding up orders against companies which organise what are, in effect, pyramid selling schemes provides a good example (see, for example, Clay, 1996). However, the problems involved in pursuing a systematic strategy of exclusion and elimination whilst preserving a clear distinction between illegitimate and legitimate commerce are still acute; especially since the ultimate aim of the regulatory apparatus is to the preserve the integrity and viability of the forms and structures of commerce from which illegitimate commerce draws its expression (see the discussion on the 'mis-selling' of pensions affair in Chapter VI).

[26] That is where the crime leads to a trial and conviction.

[27] Before the policy was changed it was being ignored with increasing frequency (SFO/CS1, 1992).

[28] Participant observation in the Press and Information Office between September 1994 and August 1995.

[29] During the period under discussion there was a decisive shift in the SFO policy which encouraged the release of information, particularly on a background basis (SFO/CS2, 1995).

[30] Participant observation during fieldwork.

[31] Personal communication (September 4th 1994).

[32] Personal communication (December 7th 1994).

[33] Participant observation during fieldwork and personal communication with David Hellier of *The Independent* (April 21st 1995).

[34] Personal communication (22nd November 1994).

[35] Participant observation and personal communication (16th and 17th December 1994).

[36] Other than the first Guinness trial, those of the SFO's cases which have received the most coverage in the news media have all involved a perceived failure at one level or other.

[37] Although the 'thing' of value or the object of the fraud is not always money, it can in most cases be measured in monetary terms. For exception to this see the offences that Roger Levitt, Mark Reed and Alan McNamara pleaded guilty to in Chapter VI.

[38] The figure is not completely accurate in this respect. It includes two trials which should be excluded on the basis of the stated terms of the calculation. The first trial, against Golecha and Choraria, was concluded before 6th April 1988, the date the SFO became fully operational. In addition to this, the figure also includes the guilty plea of Anthony Smithson as a separate trial, even though he was a co-defendant of Mohammed Naviede who contested the charges against him and was found guilty after 4th April 1995.

[39] For a detailed statement of the criteria used to determine a trial, see Serious Fraud Office, 1995: 59.

[40] The first to guard against the danger of the proceedings becoming unmanageable and the second to eliminate the possibility of one of the defendants, David Mayhew, suffering prejudice by virtue of his standing trial with Seelig and Spens.

[41] The first trial involved Ernest Saunders, Gerald Ronson, Anthony Parnes and Sir Jack Lyons (as he then was); the second involved Roger Seelig and Lord Patrick Spens; the third involved David Mayhew and Seelig again; the fourth and final trial involved Tom Ward.

[42] See *R v Mohammed Baqi* (1994) and *R v Nazmuddin Virani* (1994).

[43] Section 2(13) of the 1987 Act imposes criminal liability on a person who, without reasonable excuse, fails to comply with a section 2 notice. Section 2(14) imposes criminal liability on a person who either knowingly or recklessly makes a false or misleading statement in purported compliance with a section 2 notice. And section 2(16) imposes criminal liability on a person who, when knowing or suspecting that an investigation by the police or the Serious Fraud Office is either being carried or likely to be carried out, either falsifies, conceals or destroys documents (or permits this to be done) which he (or she) knows or suspects would be relevant to such an investigation.

[44] This figure also takes into account the observations made in the above endnote relating to the accuracy of the SFO's statistics on the number of cases it has brought to trial.

[45] It is also an adjustment necessitated by the data upon which this analysis is based, which has been exclusively produced by the prosecution (see Appendix II).

[46] Nearly all economic effects ultimately have a physical impact and fraud, almost invariably, has an impact beyond the value of money which is lost. The most notable case in which the physical impact of fraud was highlighted was the fraud on the Maxwell pensioners committed by Robert Maxwell.

[47] Although there is admittedly no particular reason why the definition of organisational fraud should be limited to legally recognised victims, because this inquiry deals with alleged or proven cases of criminal fraud, it is more coherent (and certainly far simpler) to do so.

[48] Whether these 'speculative investments' were truly investments at all, was the subject of dispute during the Barlow Clowes case. Peter Clowes, the principal defendant, contended that they were and, moreover, that the terms of his advertisement entitled him to make them. The prosecution, on the other hand, severally described them as 'speculative investments' and Clowes own personal investments.

[49] See for example *R v Mahmoud Sabbagh* (1991) (Natrocom Group) and *R v Shiraz Kassam and others* (1994) (Baron Hotels and Leisure Ltd.). In prosecutions involving partnerships the distinction is irrelevant where the partners are the defendants. The partners are the partnership.

[50] See Appendix II, Table 4 for a more digestible representation of the figures included in the following discussion.

[51] This includes partnerships where the senior partner has been prosecuted.

[52] These figures include wholly own subsidiaries of public companies.

[53] In relation to the delivery of modified accounts in a given financial year the Companies Act of 1985 defines a company as small if at least two of the following conditions are satisfied: that the amount of its turnover for the years is not more than £1.4 million; that its balance sheet total is not more than £700,000; or that the average number of persons employed by the company in the year does not exceed fifty. The same Act defines a company as medium sized if at least two of the following are satisfied: the amount of its turnover for the year is not more than £5.75 million; its balance sheet total is not more than £2.8 million; or the average number of persons employed

by the company in the year (determined on a weekly basis) does not exceed two hundred and fifty [sections 248(1)(a),(b),(c) and 248 (2)(a),(b) and (c) of the Companies Act 1985).

5

GUINNESS, BLUE ARROW AND DECRIMINALISATION

The news media's coverage of cases investigated and prosecuted by the SFO is highly selective. Some cases, such as those involving George Walker, Roger Levitt, Asil Nadir, Peter Clowes and, more recently, Nick Leeson and the Maxwell brothers, have been given extensive coverage, with the remainder having been either ignored or subjected to a brief report in the business pages, usually at the conclusion of proceedings when the jury gives its verdict or the defendants are sentenced (see Stephenson-Burton, 1995). Blue Arrow and particularly Guinness which (until the prosecution of the Maxwell brothers[1]) attracted more coverage than any other of the SFO's cases, were (along with Barlow Clowes) the first of the SFO's cases to attract considerable media attention. The coverage both cases received in the news media continued long after the conclusion of the original legal proceedings. This, in part, was due to a succession of appeals to both the domestic and European appellate courts made by the defendants in the first Guinness trial and the single appeal made by the convicted defendants in the Blue Arrow trial. It is also, however, a result of how the news media tended to make sense of the SFO. One of the major narratives of the news media's coverage of the SFO, is the narrative of a fundamentally flawed, incompetent prosecution agency. In fact, it seems that the SFO's failure in the courts is a central feature of its newsworthiness. One of the Press and Information Officers in the SFO, for instance, was told by a journalist from a national daily newspaper that, 'nobody wants to know about the SFO's success, it is far more interesting when it fails.'[2] It is within this narrative of failure, that Guinness and Blue Arrow continue to be resurrected, since to make sense of the image of failure, to put it into context, the news media tend to rehearse the SFO's past performance in the courts, with Guinness and Blue Arrow, for a long time the most celebrated (or notorious) of its cases, commonly the first to be listed (see for example, Gillard, 1996; Lynn, 1994; and Steele, 1996).

Given that both cases formed the basis of so much of the SFO's coverage in the news media they have, to a large extent, come to represent the type of case that the SFO generally prosecutes. However, since the SFO's coverage in the news media generally centres on discrete cases - so that its image is intimately bound up with the cases it prosecutes - the considerable coverage that Guinness and Blue Arrow have received has also made a significant contribution to defining how the SFO itself had come to be understood. More specifically, Guinness and Blue Arrow have assumed a central position in preserving the SFO's image as an expansionist organisation which operates to extend the reach of the criminal law against large commercial organisations and financial institutions based in the City of London.

The allegations of fraud that formed the subject of each of the cases were relatively esoteric and, historically, had rarely formed the basis of criminal prosecutions. The cases therefore reinforced the popular image of the SFO as an expansionist organisation, actively involved in pushing back the frontiers of the criminal law. The cases also involved some of the City of London's most established and well-known financial institutions, such as the Natwest Investment Bank Limited, a subsidiary of the National Westminster Bank PLC, the merchant bank Morgan Grenfell (which, at the time of Guinness's take-over of Distillers, was the leading adviser for UK mergers and acquisitions), and Cazenoves, which a decade after 'Big Bang' continues to act for more clients than any other stockbrokers (Gapper, 1996). This too reaffirmed the SFO's status as an expansionist organisation, but in the sense that it was extending the reach of the criminal law into the deeper recesses of the UK's principal financial centre. Guinness and Blue Arrow, in short, simultaneously promoted and reinforced the SFO as a ground-breaking organisation which realised the subordination of both finance and industrial capital to the democratic state through the institution of the law.

Neither Guinness nor Blue Arrow, however, is typical of the SFO's prosecutions and therefore even less so of the overall pattern of commercial fraud prosecution during the 1970s and 1980s. During the period under discussion, for instance, they rank alongside only three cases in which the frauds claimed by the prosecution were committed to further the goals of commercial organisations which (at some time during their trading history) had been listed in the top two hundred companies on the Stock Exchange. Moreover, apart from Alexander Howden and BCCI, none of the SFO's other cases involved financial institutions

based in the City of London even approaching the size and importance of those involved in Blue Arrow and Guinness.

There are other cases which share the important distinguishing feature of economic power. Polly Peck International PLC (which, at the peak of its share price in June 1990, was valued at nearly £2 billion) and Brent Walker PLC (valued at £188 million in January 1990), for instance, were both large public companies which formed the subject of SFO prosecutions (Barchard, *et al*, 1990; David, 1990; Sullivan, 1990). To discover what truly sets Guinness and Blue Arrow apart it is necessary to examine two additional features of the cases: namely, the effect of the alleged fraud on the financial viability of the commercial organisations involved and the economic relations of the fraud. Since it was in these respects that Guinness and Blue Arrow are ultimately distinguished from the SFO's other cases involving either large commercial organisations or sizeable financial institutions based in the City of London.

GUINNESS AND BLUE ARROW AS DISTINCT CASES

The first additional distinguishing feature of the cases, and in many respects the most important, was that neither County Natwest, its parent, the National Westminster Bank, nor Guinness were wound up, placed into receivership or administration.[3] This, as we saw towards the end of the last chapter was rare, and (the Marconi case excluded) exceptional in cases involving large commercial organisations. Polly Peck International PLC, for instance, was reported to have collapsed with debts provisionally estimated at £1.36 billion. BCCI collapsed with debts estimated at $2000 million (IBC01/TT, 1993). Although Brent Walker PLC continues to trade, it only escaped being placed into receivership (its negative net worth in 1991 was £455.8 million) since it was more profitable for the banks, its major creditors who were owed a total of £1.6 billion, to delay a sale of the company's principal assets until the recession of the 1990s had ended (Atkinson, 1992; Mackay, 1992; Urry, 1992).

The second additional distinguishing feature concerned the ambiguity over the extent to which the defendants were alleged to have gained from the frauds committed. Although in respect of the first Guinness trial Ernest Saunders has persistently denied having obtained a direct personal benefit from Guinness's take-over of Distillers, he was convicted of having

stolen £5.2 million from Guinness. All the other defendants in the first Guinness trial were accused of accepting large sums of money from Guinness in return for their respective roles in the illegal share support operation. The question of direct gain, or rather lack of it, proved to be a more prominent issue in the Blue Arrow and second Guinness prosecutions. Although, in his closing speech to the Blue Arrow jury, leading counsel for the prosecution, Nicholas Purnell, attempted to explain to them how the defendants had 'profited' from the fraud, the SFO's case did not generally attempt to make any capital out of the question of 'personal enrichment'. Nor was it able to. Not only did the trial judge, Mr Justice McKinnon, direct the jury to discard Purnell's 'prejudicial' remarks, but there was no evidence of personal gain other than in terms of the prestige and job security that success would bring in such a large rights issue (CNW01/TT, 1992).

Another distinctive and ambiguous aspect of the Guinness and Blue Arrow prosecutions concerned whether the alleged victims in the case had suffered any permanent loss. Guinness shareholders, the nominal losers in the Guinness case, were later portrayed as having profited considerably from the unlawful methods which had been used to win the take-over battle for Distillers. An article in *The Daily Express*, for instance, recorded at the conclusion of the first Guinness trial that 'Guinness investors...still have every reason to toast [Saunders's] name', noting that anyone who had invested £100 when Saunders had first joined the company in 1981 would, by August 1990, have shares worth £1,300 (Fletcher, 1990). Guinness's share price, after a sharp fall in the immediate aftermath of the bid, had increased substantially over the years following the Distillers' acquisition, out-performing the average increase in the shares of comparable companies in the drinks sector (GU02/TT, 1991). This, however, obscured the fact that if Argyll (the owners of Safeway who had contested the bid for Distillers with Guinness), rather than Guinness, had taken over Distillers it too would probably have profited considerably from the acquisition. As Oliver Roux observed in the second Guinness trial, poor marketing had meant that Distillers brands had yet to have their full potential realised (GU02/TT, 1991). The shareholders of Argyll, in other words, had been deprived of the unrealised value in Distillers shares. Some Distillers shareholders had also been financially prejudiced as a consequence of the strategy employed by Guinness and its advisers to take over Distillers (GU03/CS, 1991). Moreover, purchasers of Guinness shares during the bid, who were not part of the share support operation, had paid an inflated price for the shares since the operation had 'artificially'

increased their value. Guinness shareholders also lost millions from unlawful inducements paid out to those participating in the share support operation.

The position was marginally different in the Blue Arrow case. The alleged victims in the Blue Arrow case were the financial institutions which had acquired Blue Arrow shares. Although these institutions had been financially disadvantaged as a result of the inflated price of the shares produced by the 'late take-up' of shares in the wake of Blue Arrow's rights issue in September 1987, because the affair only cost County's parent, the National Westminster Bank, an estimated £110 million, County was in a position to provide compensation, reported in *The Financial Times* to be £30 million (Waters, 1990). There were victims, in other words, but those victims did not suffer permanent loss - the continued solvency of the National Westminster Bank enabling restitution to be made. The sum effect of this was that the second Guinness trial, the Blue Arrow prosecution, and, to a lesser extent, the first Guinness trial bore an number of features which tended to set them apart from the typical prosecuted commercial fraud and the perception of the typical property offence.

However, since the questions of personal enrichment and victim loss were equivocal, the most important feature of the case was the fact that the organisations involved continued to trade profitably beyond the commencement of criminal proceedings. Most cases of organisational commercial fraud involve collapsed companies. Criminal prosecution has generally been an instrument of censure for failed commercial organisations. Dorrain Williams had once said that 'the experience of my colleagues in FIG does nothing to make me confident that this, the second challenge awaiting us, will be tackled with the resolution required' (Williams, 1987). The SFO, in prosecuting Guinness and Blue Arrow, had seemed to dispel Williams's pessimism. They represented an important landmark in the trend of criminal justice expansionism which had begun in the early 1980s. Against the context of those cases of alleged commercial fraud which gained notoriety during the development of the reform process, cases like Guinness and Blue Arrow, it seems, were never envisaged as likely subjects of prosecution. Throughout most of the reform process it had appeared that the major aim of the reforms was to ensure that small to medium sized financial service firms (especially investment firms) were prosecuted in the criminal courts. Guinness and Blue Arrow, however, differed markedly from these types of cases and represented a powerful testimony to the State's commitment to using its coercive apparatus as an

institutional response to commercial fraud with just as much industry as it had invested in the control of the working-class. Unlike the large cases that came after them, they did more to form the image of expansionism: representing an unexpected transformation in the relationship between the state's criminal justice apparatus and capital.

There is, however, a danger of placing too great a store in their significance. Two cases alone do not appear to represent a decisive expansion in the scope of criminal justice intervention. Blue Arrow and Guinness could have signalled a trend in the future pattern of criminal prosecution, but this should not be taken for granted. It is important to resist the conclusion that they signalled the beginning of an era of growth in the scope of criminal justice intervention simply because they coincided with a fundamental restructuring in commercial fraud regulation. The SFO might have made the expansion of criminal justice intervention possible, but its mere existence (even in conjunction with the new self-regulatory regime under the FSA 1986) did not necessarily mean that the new apparatus of commercial fraud control was in some way structured to systematically challenge and enlarge the limits of criminal justice. Whether this was the effect of the SFO must be subjected to closer analysis. This is important for two reasons. First, because it is important to understand the dynamics behind the relationship between commerce and the criminal justice process. And second, there is a danger that it may appear that commercial fraud prosecution is driven by the same political and economic pressures behind the general law-and-order strategy of the State. To discover whether Guinness and Blue Arrow represented a permanent feature of the future pattern of criminal justice intervention the reasons behind their prosecution and the operation of the SFO after their prosecution must be addressed.

THE GUINNESS AND BLUE ARROW INVESTIGATIONS

Although the Guinness prosecutions seemed to mark an expansion in criminal justice intervention, it is important to recognise that they were a product of chance events and the specific political pressures of the mid 1980s. The Guinness investigation would never have occurred had it not been for Ivan Boesky. Boesky, the uncrowned king of the Wall-Street 'arbitrageurs', had been investigated by the Securities and Exchange Commission (SEC), the pre-eminent corporate and financial regulatory body in the United States. The SEC's investigation had primarily centred on his activities in the United States (GU01/DTI1, 1986), but Boesky had also played a central role in Guinness's take-over of Distillers. In his

interview with officials from SEC Boesky had made a number of statements which had indicated that criminal offences had been committed in relation to the bid. Although the evidence that was made available to the authorities in the United Kingdom was only suggestive and, as Boesky had originally refused to be interviewed by the British police without first being granted immunity from prosecution, there was little prospect of any further significant evidence being provided through this channel, the Secretary of State for Trade nevertheless took a decision to authorise an investigation under section 432 of the Companies Act of 1985 (GU01/DTI1, 1986). The investigation formally began on 1st December 1986 and within ten days the inspectors who had been appointed pursuant to the provision began interviewing individuals.

The speed at which the DTI inspectors began work on the Guinness investigation was reflected in the short space of time that it took the inspectors, through the DTI, to alert the CPS of the suspicion of criminal offences. On 12th January 1987, Ian Donaldson, one of the DTI inspectors, had phoned John Rickford of the DTI to inform him that they had found 'the first concrete evidence of very substantial potential criminal transactions' - namely two letters from subsidiaries of Bank Leu to Thomas Ward agreeing to purchase Distillers shares in return for an indemnity (GU01/DTI2, 1987). Rickford, after a short discussion with Michael Howard, then a Minister at the Department of Trade and Industry, phoned John Wood, the Controller of FIG, the next day (GU01/DTI2, 1987). From then on the course and speed of the DTI inspection was dictated by the demands of a future criminal prosecution.

Although the detection of the Guinness case was not a result of the specific political demands of the mid 1980s the management of the investigation - the speed at which the inspectors embarked upon the investigation, the speed at which witnesses were interviewed and documents collated, and the decision to inform FIG at the earliest available opportunity - was. One of ironies of the SFO's history is that the political pressures behind the eventual prosecution of one of its most exceptional cases, a case largely unrepresentative of those which came before and followed it, was identical to those which had shaped the form of the SFO. The Government's relationship with the City and its persistence with self-regulation had become an issue of considerable political importance. The debates had pre-dated the SEC's communication of Boesky's involvement in the Guinness affair, but the affair itself had become a central plank of the Opposition's attack on the Government. The Government

was accused of insufficient control over the take-over and of failing to use competition policy to protect Pilkingtons' against BTR's hostile take-over bid. Margaret Thatcher was forced to defend self-regulation of the City and presented the institution of a DTI inspection into Guinness's take-over of Distillers as evidence of the Government's determination to act against any impropriety (Naughtie, 1987). Only a matter of days after Wood had been informed of potential evidence of criminal offences, Ian Wrigglesworth, the industry spokesperson for the Social Democratic Liberal Alliance had stated that: 'There was already sufficient information in the public domain to make it quite clear that this whole affair stinks and is leaving a dreadful aroma over the whole of the City' (Wrigglesworth cited in Naughtie, 1987).

The criticism in Parliament and the news media was a constant source of concern for the staff at the CPS and DTI involved in the Guinness investigation. Before the formal involvement of the police, the political dimension of the case, and in particular the representation of commitment in the news media, was a recurrent theme during the early stage of the investigation - enough for Rosalind Wright to state that: 'The press seem concerned that the absence of the police shows a lack of commitment' (GU01/CC2, 1987).

The clearest evidence of the political dimensions of the prosecution was given at a meeting between civil servants at the DTI, prosecuting counsel and staff from the CPS Fraud Divisions, in which Jonathan Rickford, a senior solicitor at the DTI, was recorded as stating that:

> 'The DTI have a public interest function and would pass on the Secretary of State's views on the matter. The creation of a false market in shares is an offence under the Financial Services Act so the precedent-setting aspect is therefore not quite so important. The DTI thought there was a public interest in prosecuting what was a major fraud which had brought the City into disrepute. The DTI wished to be seen as cleaning-up the City and if a false accounting charge helped to do this then it was worth considering.'
> (GU01/CC2, 1987)

The investigation of the Blue Arrow case did not arise from the same set of pressures as the Guinness case. However, its course through the criminal process was, in many respects, equally contingent. It was generally agreed at the eventual trial that the fact of the late take-up would probably have remained secret had it not been for the stock market crash of

October 1987 (CWN01/TT, 1991). This prevented County Natwest from gradually selling its substantial stake in Blue Arrow, the employment agency, in a rising market and was instrumental in alerting *The Economist* to the merchant bank's actions during the rights issue it had promoted to enable Blue Arrow to take-over Manpower, the largest employment agency in the world. In January 1988 a report in *The Economist* questioned whether County Natwest had broken the disclosure requirements of the Companies Act. This galvanised the DTI into action, although its preliminary enquiries were soon terminated after a request from the Bank of England to allow Natwest to investigate its subsidiary's conduct. According to Terry Green, who took over as chief executive after Jonathan Cohen resigned, 'the Bank was not unduly worried on any score and that they were not looking for any investigations' (Green cited in *The Economist*, 7/3/92). The Bank of England sought throughout to protect County Natwest from a formal inspection by the DTI. The internal report had failed to uncover the full extent of County's efforts to conceal the failure of the rights issue, but the Bank of England nevertheless lobbied the DTI to take the line that what had come to light was as a result of 'technical shortcomings' and not a conscious circumvention of the rules. (*The Economist*, 7/3/92). This initially proved successful. In October 1988, however, *The Economist* published another report that there had been an internal inquiry and that it had been a 'white-wash'. The Bank of England continued to lobby the DTI against it instituting a formal inquiry, but in December the DTI appointed inspectors to look into the affair (*The Economist*, 7/3/92).

Although the foregoing does not prove that the DTI was only forced into appointing inspectors to investigate the rights issue in response to the series of articles in *The Economist*, the sequence of events is highly suggestive and without *The Economist's* persistence, the Bank of England's efforts to protect County Natwest from an investigation might have proved successful.

GUINNESS, BLUE ARROW AND THE POLICY RETREAT

The significance of the second Guinness and Blue Arrow cases goes beyond the mere fact of their qualitative differences from the SFO's other cases. More importantly, both cases, especially Blue Arrow, galvanised a shift in serious fraud prosecution; a retreat from the ambition and expansionism which was beginning to characterise the SFO's operation. This retreat comprised several dimensions. Its development was uneven, its components

ambiguous and open ended. Nonetheless, commercial fraud prosecution did undergo an appreciable and significant departure from its immediate past as the elements of the existing management of serious fraud prosecution were at first disrupted, then displaced and finally regrouped around a different, although not entirely novel, set of premises and themes.

Each component of the regression in commercial fraud prosecution constituted a response to the immediate problems posed by the Blue Arrow and second Guinness trials, but each was aimed at shaping the future development of serious fraud prosecution. Although not every component was deliberately designed to reduce the scope of criminal justice intervention, this was ultimately their effect. The first, and most significant, was a more formal clarification of the dividing line between regulation and criminal prosecution. This realignment, although open-ended, nonetheless represented a deliberate policy to decriminalise an ill-defined, yet identifiable, class of commercial fraud. The second, more indirect effect, concerned the organisational ethos of the SFO which, in a number of respects, became less ambitious and more circumspect. This, although never formalised within the SFO's operation in a systematic manner, nevertheless became articulated in its management of cases. The third related to the SFO's presentation of its cases and involved judicially imposed restrictions on its capacity to present the outcome of its investigations within a single trial and, as such, the full scope of the defendant's alleged criminality.

The following discussion primarily concerns the clarification of the interface between criminal justice intervention and regulation (the second and third aspects of the recession in commercial fraud prosecution are given a more detailed appraisal in the following chapter). It begins with a critical examination of the discourse which developed around the second Guinness and Blue Arrow trials to justify the retreat in criminal justice intervention and concludes with a brief account of the contours of the new interface between regulation and criminal justice intervention.

GUINNESS, BLUE ARROW AND THE DISCOURSE OF CRIMINAL JUSTICE RETREAT

What had occurred to produce the regression in commercial fraud prosecution was, in effect, a confrontation between opposing ways of understanding the position, purpose and future of commercial fraud prosecution. On one hand, there was the SFO's relatively

unrestrained prosecution policy, the only observable limitations on which were the physical and conventional legal limitations of prosecution - the SFO's budgetary restrictions, the restrictions of the criminal law and the constraints on its capacity to obtain and present evidence in court.

It is important not to overstate either the SFO's capacity or readiness to adopt a prosecution policy which would either realise a continual expansion in the scope of criminal justice intervention or preserve a marked extension in the scope of criminal justice intervention. The SFO's budgetary restrictions, although not rigid,[4] nevertheless imposed significant constraints on its ability to proceed against cases and expand the scope of criminal justice. Before 1995, for instance, the SFO was only resourced to investigate 55 to 60 cases at any one time (SFO, 1988-1995; and see George Staple's evidence to the Home Affairs Select Committee, 1994). More significantly, as we saw in the last chapter, the SFO's resources limited the number of trials it was able to complete in a given year to about 20. Although a majority of these cases were significantly different from the cases brought to trial before the SFO became fully operational, most nevertheless concerned small companies which had either been wound up or placed into administration; and were therefore similar to the typical cases prosecuted by the DPP during the early 1980s. Few bore even a vague resemblance to the Blue Arrow and second Guinness cases: the epitome of criminal justice expansionism.

Furthermore, cases still had to be referred to the SFO. On the basis of cases it brought to trial, it would appear that cases resembling Blue Arrow and Guinness (which not only involved large public companies, but also companies that continued to trade independently beyond prosecution) were still peculiarly resistant to referral; either because financial collapse was a central feature in the discovery of fraud[5] or, alternatively, because the major private institutions of fraud detection[6] would only pursue criminal justice intervention as an option when all other alternatives, such as civil actions, were redundant (Calavita and Pontell, 1995).[7] Moreover, where cases had been referred without one of the public institutions of detection, such as the DTI, having undertaken a prior inquiry, the SFO at times demonstrated extreme caution in proceeding with an investigation, especially where the company involved in the alleged fraud was still trading. A good example of this was the two investigations the SFO undertook into the leisure conglomerate, Brent Walker PLC (Brent Walker). The second led to the trial of George Walker, the chair and chief executive of the company, and its finance director, Wilfred Acquilina (*R v Walker and Acquilina*,

1994), but it had been preceded by an earlier inquiry covering similar terrain to the trial. This investigation was instituted in response to an article in *The Independent* alleging that Brent Walker's profits had been artificially inflated but, in light of the events that followed, it was not conducted as rigorously as it might have been. Only a small team of accountants was commissioned to investigate the allegations. More significantly, the investigation was soon abandoned for lack of evidence; the investigation team relying heavily on the interpretation of a review of the allegations undertaken by Brent Walker's solicitors, Simmons and Simmons, and its accountants, KPMG (BW02/BB1, 1994).[8]

There was, nonetheless, some evidence supporting the claim that (resource restrictions notwithstanding) the SFO's decision to investigate and prosecute cases was primarily taken on a strict interpretation of the substantive criminal law with little attention paid to other factors such as the nature of the fraud. This approach is, perhaps, best captured in Barbara Mills's sweeping definition of commercial fraud given soon after taking up the Directorship of the SFO. After having placed commercial fraud in three categories - premeditated frauds, frauds committed in response to financial difficulties and frauds undertaken during a particular episode (Donkin and Walters, 1990) - she said:

> 'They all involve dishonesty, they all involve the defrauding of other people - either directly...or indirectly where the market is rigged to the disadvantage of those who are on the receiving end....They all rank equally importantly in my categories.' (Mills cited in Donkin and Walters, 1990)

On the issue of dishonesty, she added:

> 'If anyone thinks that dishonest conduct is not a crime, then it is time they rethought their attitude to life. There is no fraud you can commit which isn't a criminal offence involving dishonesty. The real acid test is: would you mind everyone knowing what you have done?' (Mills cited in Donkin and Walters, 1990)

On the other side of the debate, there was the legal profession (see for example Roberts, *et al*, 1992), including the bar and the judiciary, the news media and central government. All of these institutions mobilised against the SFO and serious fraud prosecution in one way or another. What unified them was the idiom of their enquiry: to prevent a repetition of the second Guinness and Blue Arrow trials. To guard, in other words, against a trend in

prosecution - which was initiated by the Guinness prosecutions after a unique convergence of events and pressures - from becoming a permanent feature, or rigidly applied norm, of commercial fraud prosecution. The aim, and end effect, was to secure the return of serious fraud prosecution to the assumptions and themes that had underpinned the Fraud Trial Committee's report - the pre-eminence of financial considerations, expedient investigations and shorter trials. And with this the prosecution of cases which more closely resembled those that had precipitated the reform process.

The Blue Arrow and second Guinness trials had combined to raise an awareness of the consequences of expansionism. These had gradually developed into an oversimplified, readily appreciable, if inconsistent, set of central themes. The list of expansionism's flaws was extensive. A great amount of criticism, especially in the news media, focused on the SFO's reliance on its section 2 powers. The SFO, it was claimed, was far too ready to use its powers with the effect of eroding the inalienable rights against self-incrimination of those involved in its investigations. Parliament might have granted the power but the SFO, presumably, was obliged to use it responsibly. Although the validity of the criticism is questionable in view of the extent to which the power was used against 'unwilling' recipients of section 2 notices (Levi, 1993: 32-34) and the extent to which conventional criminal suspects were able to exercise the right in practice (Saunders and Young, 1994), it came to attain an important position in the mythology of commercial fraud prosecution. Significantly, it reinforced the argument that those accused of commercial fraud were being forced to suffer a uniquely oppressive experience at the hands of the SFO. Notwithstanding this important criticism of serious fraud investigation however, expansionism's central flaw was said to be its effect on the trial process.

With an hypnotic repetition expansionism was accused of having produced trials of such length that juries could no longer be expected to fulfil their role of weighing up the relevant facts, that the court process could no longer bear the strain on its resources and that the state could no longer bear the expense. The source of this criticism had originated in the comments Justices McKinnon and Henry had made at the conclusion of the Blue Arrow and second Guinness trials. Henry, for instance, had said:

> 'A considerable amount of public money has been lost...It is unsatisfactory for all of you who have devoted so much care and attention over so long a period to this public duty.' (GU02/TT. 11/2/92)

Further on. he added:

> 'Once again this case has thrown up the problems of long criminal trials and the appropriateness of our criminal justice system - whose rules were designed to cater for short trials and simple facts - not complex trials.' (GU02/TT. 11/2/92)

The judges' comments on the length of trials had at least two important effects. The first and most immediate effect was that the criticisms led to the SFO drawing up guidelines[2] aimed at encouraging its staff to keep the number of counts proceeded with in any one trial to a minimum. The second. and more significant to this discussion. was that the comments gave the news media an ideal focus upon which to locate their criticisms of the SFO. serious fraud prosecution and. most importantly of all. the prosecution of cases similar to Guinness and Blue Arrow. One of the great ironies of the SFO's history was that the news media had played a central role in pressurising it to accept Guinness and Blue Arrow for prosecution. but it was also the news media which criticised it for prosecuting the cases. After recording McKinnon's comments about the length of the Blue Arrow case. for instance. one of many articles in the news media to adopt the same account of events (see. for example. Kane and McCrone. 1992) reported:

> '..by the weekend it was the SFO itself. and its habit of over-complicating and lengthening already complex trials which was very much on trial. Lawyers. judges and defendants alike all joined in a rising crescendo of criticism and dissatisfaction with an office which was set up only four years ago.' (Fallon. Walsh and Davidson. 1992)

Beneath these technical and indissoluble criticisms lay a more deeply submerged political subtext, which was itself observable in the judge's criticisms of the trials. This involved a recognition that the burden commercial fraud cases were imposing on the criminal justice process had not simply changed. but the cases themselves had as well. The differences between the SFO's other cases and the second Guinness and Blue Arrow trials were accentuated. It was argued that these cases, contrary to the SFO's attempts to define otherwise, were not serious fraud but technical breaches of regulation - for the first time a

distinction was being drawn between commercial frauds. This was put in its clearest terms in a *Sunday Times* article which, in urging that 'a more fundamental point about the recent trials' be addressed, stated:

> 'To the average man a fraud has been committed when someone personally steals money...That makes him a crook and a swindler. In Guinness I there was an element of that, although no such charge was brought against Ernest Saunders. But in Guinness II and III, and in Blue Arrow, we have entirely different cases...Nobody suggested [the Blue Arrow defendants] had taken money themselves. The prosecution's case was that they desperately wanted to ensure the success of Blue Arrow's £837m rights issue...If it failed, their reputations would be severely damaged: if it succeeded, they would be heroes within the firm...So they chose to take up the issue themselves and lie to the Stock Exchange and the rest of the City...Does that make the Blue Arrow defendants swindlers and crooks? Not in my book....future trials must be shorter, simpler and cheaper. But surely some sort of division also has to be made between genuine fraud and the professional breaking of technical rules.' (Fallon, 1992)

What became important was not the effect of the alleged fraud on its victims, or the defendants' motivation for committing the alleged fraud, but the effect of the process on the defendant. The label of the fraudulent businessman became displaced by the ruined businessman. Again the news media took its lead from McKinnon and Henry. *The Telegraph*, for instance, repeated verbatim Henry's explanation to the jury for the premature termination of the trial:

> 'The strains on him have been enormous and they have proved to be too much, as even he now recognises...His mental condition has reached the point when it is no longer possible for him to conduct his own defence.' (O'Brien, 1992)

Henry's and McKinnon's role in leading the coverage in the news media was also central to the last of the news media's themes - the decriminalisation of cases similar to Guinness and Blue Arrow. Henry, for instance, was quoted as having told the jury:

> 'Once again this case has thrown up the problems of long criminal trials and the appropriateness of our criminal justice system - whose rules were designed to cater for short trials and simple facts - not complex trials. It seems to me inevitable that we must find cheaper and quicker ways to deal with serious fraud trials, and the likelihood is we

> shall need a radical solution rather than merely tinkering with procedure.' (Henry cited in Wilkinson, 1992)

Against estimates of the cost of the Blue Arrow trial of between £30 to £42 million, based upon the defendants own assessments,[10] these calls for 'radical solutions' initiated a discourse in which partial decriminalisation of commercial fraud came to be thought of as the only available alternative, closing off other lines of enquiry.

THE INTERFACE BETWEEN REGULATION AND CRIMINAL PROSECUTION

The legacy of the Guinness and Blue Arrow cases has not simply been their importance to shaping the SFO's image as an expansionist, ground-breaking police force of the City of London, but also their effect in clarifying the division between regulation and criminal prosecution. More specifically, the collapse of the second Guinness trial and the Blue Arrow trial galvanised a process which was designed to ensure that, in future, similar cases would only ever be prosecuted if there was pressure to do so from the news media. If the legitimacy of criminal justice and financial services regulation in such cases could be secured without prosecution then prosecution would not follow.

The terms of this division are to be found in the SFO's working manual which sets out the terms on which regulators and the SFO should base their decisions as to the appropriate course of action. The guidelines are not strict, but instead stress that the criteria contained within them are aimed at offering 'some pointers or orientations to assist those concerned with handling decisions' and are not intended to 'take away from those concerned with decisions on the appropriate avenue (prosecution, regulatory action, *etc.*) the obligation to exercise their discretion as they think fit and in accordance with the law'. Nonetheless, they provide a valuable, if somewhat limited, insight into how the division between regulation and criminal justice intervention will be determined in future. The features of a case 'tending towards giving priority to regulatory action' include those cases where is it agreed that:

a) the offence 'is technical or in a grey area';

b) a 'regulatory penalty will suffice':

c) 'urgent action is needed and is best taken by the regulator':

d) the only defendants are corporations:

e) there is 'no motive of direct personal gain':

f) a 'criminal penalty [is] likely to be nominal':

g) '[the] regulator [is] more likely to succeed': and

h) reparation or restitution to the victims is an option.

The factors to be taken into account in 'giving priority to prosecution' include those cases where it is agreed that there is:

a) a 'high level of public concern in punishment':

b) 'serious dishonesty on [the] part of main potential defendants (for example, where it seems likely that at least one defendant will be sentenced to at least one year in prison)'; and

c) 'where urgent action is needed and is best taken by the prosecutor' (SFO/WM1, 1995).

To some extent the guidelines raise more question than they answer. Some of them, for instance, are vague in the extreme. An agreement that a 'regulatory penalty will suffice' gives little indication of how the criteria will be followed in practice, although it does, amongst other things, provide a formal basis for a regulator to lobby the SFO that a non-criminal response should be the appropriate course of action. In addition to this, it is difficult to envisage a case in which a corporation and not its senior executive officers could be a defendant. In fact, the law governing corporate liability suggests that the corporation is indistinguishable from its senior executives (Wells, 1993). The guidelines also tend to

formalise McKinnon's view that indirect motives of personal gain - such as enhanced reputation in the market place or the desire to preserve one's position through dishonesty - should not be considered as instances of personal enrichment in an attempt to interpret commercial fraud as a criminal offence which merits prosecution. The distinctions between individuals and corporations on the one hand and direct personal gain and the desire to enhance one's reputation on the other are not absolute. At best they are matters of degree. although a better way of interpreting them is to consider them as constructions to excuse defendants from prosecution.

Another problematic feature of the guidelines concerns the question of 'serious dishonesty'. The guidelines offer the defendant's predicted sentence as one means of assessing this. but it is unclear whether the standard to be applied is what the SFO's staff think the offence should merit or what the defendant is likely to receive from the judge. If it is the latter then it means that the SFO have surrendered much of the terrain of commercial fraud prosecution to the judiciary who now occupy a central position in forging the pattern of criminal justice intervention. The significance is difficult to assess. Michael Levi has demonstrated the methodological problems in evaluating whether the judiciary are lenient to those convicted of commercial fraud (Levi. 1989). However. the SFO tends to take the view that many judges tend to pass sentences which fail to reflect the seriousness of the offence for which the defendant has been convicted. The prosecution of Michael Ward. and the chief executive of European Leisure. and others. is a case in point. The defendants were charged over their conduct during the bid by European Leisure PLC. in April and May 1990 to acquire the issued share capital of Midsummer Leisure PLC. The prosecution alleged that the defendants[11] had conspired together to create a false market in the shares of European Leisure during the course of the take-over bid and to create a false or misleading impression of the market in. or the price or value of. those shares. European Leisure's own funds were then stolen to meet the cost of sums invoiced to those who had assisted the share support scheme. Three of the original six defendants were convicted. George Hendry received a conditional discharge for a period of 12 months. Jeremy Howarth received a community service of 220 hours and was ordered to pay compensation of £151.042.36 to European Leisure. The last convicted defendant. Michael Ward, was given a community service order of similar length and was ordered to pay compensation to European Leisure of £63,087.54. The senior lawyer working on the case was dismayed at the sentences. He remarked that: '[The judge] was just soft.'[12] And added that: 'It is beyond me how a judge can give an

absolute discharge to someone who has been convicted of conspiracy to defraud.'[13] And generally observed that:

> '[The judge] said that the share support operation had been committed out of highest motives, in the interests of the shareholders. And that was after they had been convicted for offences of fraud against the shareholders. The shares are now worth tuppence ha'penny. Literally tuppence ha'penny.'[14]

This was despite the fact that as well as being the chair and chief executive of European Leisure, Ward[15] was also a substantial shareholder in the company. As of 6th April 1990 he, or his family trusts, owned 5,526,289 of the shares in the company - or 6.16 *per cent* of the issued share capital. In addition to this, he also had options to acquire 736,138 shares at 25.8 pence each, 429,997 shares at 46.5 pence each, 300,216 at 60 pence each and 424,808 at 76.3 pence each. His shareholding was such that at the time of the bid for Midsummer Leisure each 10 pence rise in European Leisure's share price increased his net worth by about £600,000. Notwithstanding this, Ward had borrowed heavily from Banque Nationale de Paris (BNP) to purchase his extensive shareholding in Edenberry as it then was; the shareholding being pledged to BNP as security for the loan. In early 1990 the European Leisure share price was falling and BNP threatened to sell the shareholding as the value of the security diminished. This would have been very damaging. The shareholding was recognised by the market as belonging to Ward.[16] Ward, so the prosecution claimed, had therefore a very real personal interest in ensuring that European Leisure's share price was maintained.

Similarly, the sentence given to Alexander Cole also met with criticism within the SFO. The notes of the 'wash up' conference recorded that although the SFO had accepted the 'right pleas' the sentences 'may not reflect the gravity of the offences' (BAF01/WC1, 1993). The SFO's counsel on the case remarked that: 'One is bound to be left with the feeling that the sentence on Mr Cole was not really adequate' (BAF01/IC2, 1993). He had unlawfully 'borrowed' £718,000 from various parts of the Bestwood Group of which he was chair, caused false explanations to be recorded in the books of the company to show how the money had been applied, and committed perjury in an affidavit in High Court proceedings. His intention of replacing the missing money was frustrated by the Stock Market crash and, in the event, he was only able to return approximately £422,000. Counsel noted that if the

fact had been the same save that 'Mr Cole was a sub-postmaster or shop manager' and 'the figures were £7,000 and £4,000 respectively, he would almost certainly have been sent to prison for at least 12 months' (BAF01/IC2, 1993; see also Hedderman, 1991).

The likely sentence should not be considered in isolation. The compilation of the guidelines at once ran parallel to, and were informed by, the work of a 'Steering Group on Financial Fraud' which amongst other things considers the appropriate delineation between regulation and criminal prosecution. One case considered by the Steering Group was the Levitt case in which none of the defendants received custodial sentences (see Chapter VI). A background paper on the case recorded that the 'SFO believed that a sentence of somewhere between 18 months and 4 years would be appropriate for the offence to which Levitt pleaded guilty' (SFO/SGFF1, 1994: 5). The paper recommended to the Steering Group, however, that even though the judge had given Levitt and his co-defendants a non-custodial sentence, if a similar case were to come to the attention of the authorities again it should nonetheless be prosecuted. This was, in part, because there was 'no appropriate regulatory action' and, in part, because fines were 'not an option where the perpetrator is bankrupt' but it was also a function of the news media's response to the sentences:

> 'This case has given rise to widespread public disquiet along the lines that there is a disparity in sentencing between white collar fraudsters and businessmen, and poor people who commit much more minor offences. It is clear that criminal prosecution is the only acceptable course to public opinion.' (SFO/SGFF1, 1994: 5)

These comments in the report are noteworthy for several reasons. The assertion that fines were 'not an option' since Levitt was bankrupt, in conjunction with the criteria which stresses restitution as a factor against prosecution, suggests that those who continue to remain solvent - corporations and individuals alike - are in a better position to avoid criminal prosecution. All other things being equal, that is a formal acknowledgement that solvent and wealthy defendants are able to buy themselves out of prosecution. More significant however, is the importance of the news media in dictating the scope of criminal justice intervention. The news media provides the index of a 'high level of public concern in punishment'. Its interest in a case and its call for criminal prosecution, however, are highly contingent. Most important of all, a call for punishment is shaped by whether the case is defined as potentially criminal or simply a product of legitimate if negligent or poor

business. The mobilisation of the criminal process is central to this definition. Where the labelling process is not initiated and where it is possible to define losses as being due to inefficiency or negligence rather than dishonesty there rarely seems to be widespread calls for punishment. Although there is no evidence to suggest that a fraud had been committed there was, for instance, no call for punishment in the case of the 'mis-selling' of pensions affair (see Chapter VI). The initiation of the labelling process is just as important as the essence of the behaviour in generating calls for punishment. A failure to mobilise the criminal process, in other words, provides its own justification.

CONCLUSION

The prosecution of the Blue Arrow and Guinness cases and the subsequent production of the guidelines setting out the division between regulation and criminal prosecution raises an important question - namely, whether Guinness and Blue Arrow are to be regarded as a temporary disruption in the pattern of criminal justice intervention or an experiment which proved its own undoing. A case which may cast some light on this question is the SFO's investigation into the activities of Derek Bryant Insurance Brokers Limited (the Biddencare case). The case had been referred to the SFO by Dick Outhwaite, a Lloyd's underwriter, without (initially at least) the formal approval of Lloyd's Ruling Council. This proved to be a central issue in deciding whether to accept the case for investigation. During a meeting aimed at deciding whether to accept the case for investigation Mark Ballamy, a senior lawyer within the SFO, remarked that he was 'concerned' that there was 'a possibility that Lloyd's may not welcome an investigation into an alleged fraud which occurred several years ago' (BID01/FN2, 1993). This seemed to represent an important obstruction to the SFO's decision to investigate which Ballamy had explained in an earlier note to John Tate, the SFO's vetting officer, would be contingent on 'Lloyd's itself' asking the SFO to investigate or at least showing itself 'supportive' of the SFO's involvement (BID01/FN1, 1993).

We should be cautious about what implications can be drawn from the Biddencare case since it was referred to the SFO after the conclusion of the first two Guinness trials and the Blue Arrow prosecution - a period during which the SFO's organisational ethos was marked with a greater degree of circumspection (see Chapter VI). However, it suggests that the SFO tends to organise its operation to serve the interests of the markets it polices and the representatives of those markets. Commercial fraud prosecution, in other words, rarely seems to be an end in itself. Against this observation it is important to realise the contingent nature of the Guinness and Blue Arrow cases. The Guinness investigation served the interests of a Government under political attack, whereas Blue Arrow seemed to serve the interests of an informal regulatory system which had broken down. The state's commitment to processing these cases through the criminal justice system, in other words, depended on a unique, and highly contingent, convergence of events. Notwithstanding the production of the guidelines, because of the uniqueness of these events Guinness and Blue Arrow could not be

taken as a sign of what was to come and are, perhaps, better interpreted as deviations from the normal pattern of criminal justice intervention against commercial fraud.

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[1] This inquiry into the SFO primarily covers the first seven years of its existence. The prosecution of the Maxwell brothers, which was concluded in February 1996, is therefore omitted from the case analysis in Chapter IV. This case stands on a par with Guinness and Blue Arrow in terms of the media coverage it has received. And, therefore, has played a major role in defining the public image of the SFO. The nature of the case, however, does not detract in any significant way from the findings of the present inquiry. In fact its major effect has been to entrench the SFO's image as a prosecution agency that routinely prosecutes senior executive officers who have committed fraud through some of the largest public companies in the UK.

[2] Personal communication (12th March 1995).

[3] The same is true of the other commercial organisations involved in the prosecution - Phillips and Drew (and its parent Union Bank of Switzerland), Morgan Grenfell, Henry Ansbacher and Cazenoves.

[4] Parliament, for instance, made more funds available to the SFO in 1992-1993 for the BCCI and Maxwell investigations (Levi, 1993: 70).

[5] This is the DTI's favoured interpretation. After releasing figures in 1991 showing a threefold increase in prosecutions in relation to the operation of companies, the DTI, keen to dispel the suggestion that company crime was itself on the increase, argued that the increase in the rise of prosecutions was attributable to the rising tide of company failures during the recession which exposed wrongdoing which might otherwise had gone undetected (Atkinson, 1991).

[6] In the context of company fraud these are firms of accountants, companies, institutional investors, insolvency practitioners and the various bodies recognised under the FSA 1986. This observation concerning the private institutions of detection might also, to some extent, apply to the public institutions of detection, such as the Bank of England and DTI, as well. The observation in the main text is confined to the private institutions of detection since the Blue Arrow and Guinness cases were referred to the SFO (initially CPS in the Guinness case) from the DTI; notwithstanding that the circumstances in which the Guinness case was referred were unique and that in the Blue Arrow case the Bank of England acted to protect County Natwest from being investigation by the DTI.

[7] For a possible exception to these two interpretations of the resistance of on going concerns to referral, see Brian Widlake's discussion of the SFO's investigation into Polly Peck International PLC (PPI) (Widlake, 1995: 110-158).

[8] This case provides an instructive contrast with the SFO's investigation into PPI. In that case the SFO undertook a search of South Audley Management, a private company owned by Asil Nadir, the Chair and Chief Executive of PPI. This had the effect of accelerating the decline of PPI's already deteriorating share price.

[9] A draft of which was already in place by March 1992 (BAF01/IC1, 1992).

[10] The Lord Chancellor's Department estimated that the Blue Arrow trial had cost the state just under £17 million (a figure which included the SFO's investigation costs) (personal communication 5th March 1995).

[11] With the exception of the defendant Walter Crawford.

[12] Personal communication (10th March 1995).

[13] Personal communication (10th March 1995).

[14] Personal communication (10th March 1995).

[15] Ward. a qualified accountant. had first become a Director of European Leisure on 8th August 1988 (resigning his position 3 years later on 23rd July 1991). He had previously worked as an assistant director for the merchant bank. Morgan Grenfell. and then as a director in S.G. Warburg's international corporate finance department. from where he been recruited by Samuel Montagu to work as a Director in its International Banking and Finance Department.

[16] In the event Ward acted to reduce the loan to BNP and make interest payments to it.

THE TIDE TURNS? THE LEGAL RETREAT

One of the central themes addressed throughout the foregoing chapters was whether the operation of the SFO had served to realise a change in the pattern of criminal justice intervention; a change, in other words, in the type of cases of commercial fraud prosecuted in the courts. Conclusive answers to these questions remained elusive. One thing, however, was clear. Despite its size and limited case-load, the SFO was not merely a symbol of change. The effect of its operation. in other words, was not simply to reproduce the existing boundaries of criminal justice intervention. On the contrary, the evidence strongly suggested that the SFO was, to varying degrees, instrumental to three key changes in the pattern of commercial fraud prosecution.

These apparent changes concern different dimensions of the same phenomenon - an expansion in the scope of commercial fraud prosecution. However, in terms of the extent to which large companies were exposed to criminal justice intervention, they occupy a clear hierarchy of significance.[1] The first and least significant change concerned what appeared to be a general expansion in the number of cases of commercial fraud prosecuted during the 1980s. The second was a small but appreciable rise in the number of cases taken to trial involving relatively large and established commercial organisations; cases such as Brent Walker and possibly Barlow Clowes.[2] The third was the prosecution and conviction (with conspicuously less success) of cases of commercial fraud, such as Guinness and Blue Arrow. These cases differed in a number of fundamental respects from the type of cases previously subjected to either a police or DTI investigation which was aimed at realising a criminal prosecution.

The precise extent of the second of the two more striking shifts in prosecution practice was discussed in Chapters IV and V when the SFO's case history and the significance of the Guinness and Blue Arrow prosecutions were examined. It was argued that of all the SFO's

cases it was only Guinness and Blue Arrow which represented a truly innovative expansion in the scope of criminal justice. Not only was the nature of the frauds involved unusual, but they were the only cases to involve large organisations which successfully continued to trade after prosecution. In addition to distinguishing them from the SFO's other cases, this also set them radically apart from the type of cases investigated before the creation of the SFO, let alone prosecuted. The question remains -to what extent might the cases be representative of the future pattern of commercial fraud prosecution?

This issue was discussed in the last chapter in the context of the debates on both the form and scope of criminal justice intervention which were triggered by the second Guinness and Blue Arrow trials. A key element of that debate which, remarkably, gave rise to little controversy at the time, was the proposal to decriminalise some forms of commercial fraud. The precise forms of commercial fraud which were singled out for decriminalisation have never expressly been made public. Given the immense variation of commercial fraud and the fact that one of the criteria militating in favour of criminal as opposed to a regulatory response was the 'high level of public concern in punishment' (SFO/WM, 1995), it is impossible to predict with any precision what type of commercial frauds may, in future, escape criminal justice intervention as a matter of policy. That is not to say, however, that some idea of the scope of decriminalisation cannot be acquired. The clear indication was that it was precisely the sort of cases which had objectified a qualitative shift in prosecution practice.

The indication is that policy changes within the SFO, inspired by the Treasury and participated in by the SIB, have to a large extent served to lessen the probability of cases similar in form to the second Guinness and Blue Arrow cases from being prosecuted. The likelihood is that the second Guinness and Blue Arrow cases, and possibly even the first Guinness case, do not represent a permanent feature of the future pattern of criminal justice intervention. The following discussion attempts to consider this question in the context of real cases which have been referred to the SFO for investigation. The discussion does not, however, focus solely on the effects of the procedures put in place as a result of the policy debates considered in Chapter VI. It does not deal exclusively with the decriminalisation of 'innovative' cases of commercial fraud, but rather aims to develop the discussion in Chapter V, to show the changing pattern of criminal justice intervention. It seeks to illustrate how the SFO's operation was once expansive and how, at present, it seems to be in retreat. To

this end it will examine six cases, three of which were the subject of SFO investigations during the period of criminal justice expansionism, with the remaining cases representing the present period of retrenchment.

THE AGE OF EXPANSIONISM

CONTRASTING IMAGES OF THE SFO

On 3rd July 1994, an article in the *Independent* entitled, 'SFO in further embarrassing climb-down', reported how the SFO, on the advice of its counsel, had decided to revise its provisional charges against the officers of Landhurst Leasing. The SFO's decision to revise its charges was not in itself unusual. As a matter of routine, charges in serious fraud trials are subjected to numerous changes and amendments before a final formula is decided upon. What marked this case apart, however, were the reasons that counsel gave for its advice. A jury, it was concluded, could not be relied upon to embrace the prosecution's version of events since the banks, the major victims in the case as it then existed, could be readily portrayed as being in part to blame for their losses. Although the headline represented a distortion of the report's content, it did, however, faithfully correspond to the prevailing pattern of coverage in the news media which had evolved since Roger Levitt, the chief executive of the Levitt Group, had received a community service order on pleading guilty to deceiving FIMBRA after having initially been arraigned for a fraud involving losses approaching £60 million (*R v Roger Levitt and others*, 1993). The major co-ordinating theme of this coverage was, at all times, the SFO's failure to secure meaningful convictions in the courts, but a permanent subsidiary theme was its supine and tremulous approach to investigation and prosecution (see Chapter VI).

Although the article in the *Independent* is one more example of the news media's mercurial coverage of the SFO it was (despite the disparity between the headline and substance of the report), in fact, an accurate representation of the SFO's organisational ethos at the time; an ethos which marked a profound contrast to the SFO's operation in the late 1980s and early 1990s. Throughout the period before the conclusion of the second Guinness and Blue Arrow trials, the SFO had not always taken such a considered approach to the charges it would eventually prefer on the indictment, nor did it demonstrate such extreme caution in either accepting cases for investigation, bringing them to trial or presenting them to a jury. On the

contrary, in some instances, the SFO's approach to prosecution was far less circumspect. Amongst other things, it seemed to proceed with little concern for the degree to which its presentation of the evidence corresponded to the counts on the indictment; signifying a confused and improvident approach to the preparation of its case which, significantly, was underpinned by an uninhibited and confident approach to prosecution. The case against Marcus Deller, Andrew Page and David Rycott, Directors of DPR Futures Limited (DPR), and Ian Rycott, a senior manager at the firm, (*R v Marcus Deller and others*, 1990) provides a good illustration of this approach.

EXPANSIONISM IN ACTION: DPR FUTURES LIMITED

The Background to DPR Futures Limited

DPR had traded in futures and options on behalf of some 3,500 private clients between early January 1987 and 18th July 1988 when it was finally prohibited from trading by the SIB. Since it was not a member of any commodity exchange, it could not trade on its own account and therefore used a broker (CL-Alexander Rouse Ltd.) which charged DPR a commission. DPR made its money by charging a higher commission to its clients (which was calculated as a percentage of the contract as a whole and not the margin - see below) whether the trade was profitable or not (DPR01/SE, 1989: 1-7; DPR01/TT, 1990). This proved to be an immensely profitable method of generating income. From its incorporation on 2nd September 1986 to 15th July 1988, DPR received £11,574,000 in commission and grossed £6,851,000 in profits (DPR01/SE, 1990: 7).

DPR obtained the majority of its clients through direct mailing which highlighted the type of profits which could be made trading in futures. An equal attraction to the private investor was the promotion of a loss limiting technique called the Limited Liability Contract which eliminated the risk of an investor losing more than his or her margin, a danger common to futures trading.[3] If a client returned a coupon (which came with the initial information in the mail shot) requesting further information, he or she would then receive a brochure entitled 'Opportunities Unlimited' which gave the impression that futures trading with DPR's skilled and experienced staff would give the investor substantial profits (one example was given of a profit of 480 *per cent* in nine weeks) and leave him or her in full control of his or her investment. Once a client opened an account with DPR, its day to day operation would be handled by a Senior Accountant Executive

(SAE) or, less frequently, an Accountant Executive (AE) who were paid a percentage of the commission earned for the company.

The Prosecution's Case

The defendants originally stood trial on three counts: conspiracy to obtain property by deception, conspiracy to defraud and fraudulent trading. At the outset of the trial, the prosecution's case contained several specific allegations supporting the charges on the indictment which embraced a combination of deliberate misrepresentations and high pressure sales techniques aimed at generating commission income to the prejudice of DPR's clients' interests. These were designed to show that the volume of clients who had suffered loss through DPR, estimated in excess of three quarters of its entire client base (DPR01/SE, 1989: 20), was such that inducements to trade with the company could have been nothing but dishonest.

Amongst other things, it was said that DPR's promotional literature had misled clients about the experience, skill and expertise of its staff, some of whom, having originally taken only a week's training, had failed DPR's own qualifying examination. This was compounded by the tendency of AE's and SAE's to exaggerate their expertise, the research facilities at DPR and its access to information from the trading floor. Moreover, the impression given in the company's promotional literature was that its staff would dispense individual specialist advice to clients, whereas in fact DPR's SAE's followed a rigid pattern of service pre-determined by its Research Department (DPR01/SE, 1989: 5-18).

The prosecution also alleged that DPR had made misleading claims about the potential profit which could be made from its services. To this effect, DPR operated a device called 'Good Till Cancelled' (GTC) to close out a profitable account at 30 *per cent* above break-even in the event of encountering problems with contacting a client. The extent to which the device was used meant that in 66 *per cent* of all DPR's trades it was impossible for clients to attain the level of profit referred to in DPR's brochures, since the client would automatically be taken out of a favourable market at that limited profit. Moreover, even where no GTC level was set, the average level at which profits were taken was 27 *per cent* above break-even. Neither the GTC device nor the average profit of trades entered without a GTC restriction were mentioned in DPR's advertising (DPR01/SE, 1989: 12).

Another allegation concerned the lack of clarity over the company's commission structure. According to the prosecution, clients were rarely informed that the percentage commission related to the contract as a whole and not the margin, with the effect that commissions as a percentage of margins were much higher than clients anticipated. Between, January 1987 and February 1988, for instance, DPR charged its clients commission of up to $700 per contract on a margin of approximately $2,000, which meant that the value of a client's investment would have to increase by approximately 30 *per cent* before a contract could show a profit. Moreover, because commissions were both DPR's and its staff's sole source of revenue, the prosecution claimed that this led to the company entering trades purely as a means of generating commission, and not with the primary motive of enriching the client. DPR's less than transparent approach to its commission structure was also said to extend to the risks involved in the market which, the prosecution claimed, were routinely glossed over to clients (DPR01/SE, 1989: 17-18). Finally, several of the particulars in the three counts were based on witness statements which suggested that trades were executed without clients' permission, a pre-condition of trading since DPR operated few discretionary accounts (DPR01/SE, 1989: 12).

Proving Guilt

To prove the defendants' dishonesty the prosecution had first to show that DPR's staff had systematically misled clients; second, to link the defendants to these trading methods (to show, in other words, that they had operated a method of trading which, either in conjunction with the working practices imposed on its staff or, alternatively, as a result of deliberate encouragement, inevitably produced systematic dishonesty); and, finally, to show that the defendants had been aware of how the company's staff were dealing with its clients and the full extent of client losses.

There was no direct evidence that the defendants had actively encouraged DPR's staff to mislead its clients (see below) and any evidence remotely suggesting that they had, inevitably came from the staff themselves who, although generally young and inexperienced, would nevertheless be deeply implicated in the alleged deceit (DPR01/TT, 1990: 25/6/90). This meant that the prosecution had to rely on circumstantial evidence. On the face of it, this should not have been problematic, given the company's method of trading and the extent and prevalence of client loss. What it meant, however, was that the prosecution's case depended first on demonstrating that the omissions and misleading representations made by DPR's staff were systematic and, second, that

the defendants had knowingly created an environment in which dishonesty was a pre-condition to the generation of business, given the extent of client loss. To this effect, the prosecution were spectacularly unsuccessful. All four defendants were acquitted by the jury.

The jury's verdict is open to a number of interpretations. One possibility was outlined in Levi's research study for the Royal Commission on Criminal Justice. The apparent strength of the case against the defendants (crystallised in DPR's method of trading which seemed structured, both in design and in effect, to produce extensive losses) seems to have led Michael Levi (Levi, 1993: 149-151) to describe the defendants' acquittals in terms of 'a perverse jury verdict', assisted to a large extent by a trial judge who had seemed to be 'well-disposed throughout to the defence case' (Levi, 1993: 149 and 151). On the question of the judge's disposition to the defence, there was certainly a considerable body of supporting evidence. Amongst other things, for instance, he had refused to compel the defence to do 'anything' under the powers at his disposal in the Criminal Justice Act 1987 and resisted forcing the defence to comply with an order to make its expert evidence available to the prosecution (DPR01/IC, 1990). More importantly, however, the judge's apparent tendency to manage the case in favour of the defence also extended to a number of rulings which served to weaken the prosecution's case. Thus, Levi records that the prosecution had obtained a witness statement by one of DPR's sales staff which 'made particularly revealing remarks about the defendants' close involvement in the dishonest practices of the company', but who had died before trial. The statement, although potentially admissible as evidence under section 23 of the Criminal Justice Act 1988, was ruled inadmissible by the trial judge on the grounds that the prosecution had sufficient time to get other AE's and SAE's as witnesses, although as Levi added[4] 'the fact was that the dead witness was the only one who was in a position to incriminate the defendants in depth' (Levi, 1993: 149).

Another ruling which Levi noted had operated in favour of the defendants concerned a client who was called by the prosecution to show that DPR had carried out unauthorised trades. A recording of the conversation, however, demonstrated that he had been told by the salesman about all the deals, though it 'seemed plain that he had been bamboozled into trusting the salesman to act in his best interests and had not understood what he was agreeing to' (Levi, 149-150). However, as Levi concedes, 'his imperfect understanding of what the salesman had said' was not necessarily 'a reason to infer that he had been defrauded' (Levi, 1993: 150). Moreover, there was no cogent evidence to show that the client had complained at the time which would have strengthened this inference and more deeply implicated the

defendants. Although he had in his possession a written letter of complaint which he claimed was a copy of an identical letter he had sent to the company, DPR's files did not contain the original. The judge ruled that his copy of the original was not acceptable evidence and that the jury should discount his evidence completely, rather than simply warn them, as he was entitled to do, of its probative value (Levi, 1993: 150). This, however, did not in itself indicate the judge's predisposition to the defence, considering that it was agreed on all sides that DPR had kept its records in good order. Moreover, it is unclear that, if left to the jury, it would have added much to the prosecution's case, since as the trial unfolded, the evidence in cross-examination did not sustain the allegation that trading without authorisation was a widespread practice (DPR01/TT, 1990); the prosecution's witnesses generally being 'unclear about the extent to which they had given permission to trade' (DPR01/I, 1995). This forced the prosecution to abandon the relevant particulars and it was in part because of this that the only charge which finally reached the jury was a significantly amended version of the fraudulent trading count.[5]

This latter observation indicates an alternative explanation of the jury's acquittal in the DPR case. Levi's interpretation largely leaves unquestioned the prosecution's presentation of its case. This is understandable given the strength that the prosecution's case seemed to draw from DPR's method of trading and the fact that the trial judge had not directed the jury to acquit the defendants at the close of the prosecution's evidence. Neither of these factors, however, should be allowed to prejudice our judgement of whether the apparent strength of the evidence was translated into a strong case before the jury. What is important is the precision with which the prosecution's evidence was used during the trial itself to support the counts on the indictment. If, instead of speculating about the disposition of the judge and jury, we focus on this aspect of the case, it is possible to draw a wholly different conclusion about the significance of the case.

To this effect, the prosecution's case, although ostensibly strong, seemed to be astonishingly ill-prepared and poorly thought through. As Levi acknowledges, the significance of what should have been the major fulcrum of the prosecution's case - namely that DPR's commission charges in conjunction with its extensive use of the Good Till Cancelled technique was structured to defeat the claims it made in its brochures - was never completely made clear to the jury (Levi, 1993: 151; DPR01/TT, 1990). Moreover, not only had the prosecution failed to present sufficient evidence of unauthorised trading, but even the evidence it submitted to show that the company had traded in large part for the exclusive purpose of generating commission was weak.

Although there was only a suggestion during the trial that the defendants had condoned the practice of churning client accounts (DPR01/TT, 1990), there was clear evidence from the prosecution's own witnesses at the outset that the defendants had not only disapproved of its staff using the term, but had also actively discouraged the practice following DPR's application to the AFBD on 26th February 1988 (DPR01/SE, 1989: 15).

In addition to this, the prosecution had only arranged to call one expert witness to give evidence on the level of DPR's commission. He, however, refused to testify once the SFO changed the relevant figures during the trial; having become dissatisfied with the SFO's work and fearing that it was constantly shifting its ground (DPR01/I, 1995). The result was that the prosecution also failed to establish that DPR's commissions were excessive relative to the rest of the market, where in contrast the defence called an expert who successfully testified that DPR's commissions broadly corresponded to the market norm (DPR01/TT, 1990). Moreover, although there was some evidence to suggest that the defendants had placed DPR's staff under intense pressure to 'close' a certain number of clients in a particular time or be sacked,[6] nothing significant emerged which served to link them to any misrepresentation that a member of staff might have made to a client (DPR01, TT, 1990). Furthermore, there was no evidence of a systematic failure by DPR's staff to warn clients of the risks involved. On the contrary, in relation to the prosecution's claim that DPR's staff had routinely lied about the amount of commission which was charged on trades, one member of the SFO's case team said:

> 'We didn't find a single instance of real misrepresentation as such. We only found examples of open dealings. The defence introduced thirty telephone calls in evidence; clearly demonstrating that the commission rates charged had been properly represented to clients.' (DPR01/I, 1995)

More significant, however, was the prosecution's failure to distil, rationalise or relate the issues to the indictment; giving its case an appearance of a series of dislocated examples of DPR's trading, which although prejudicial to its clients and at times obfuscating, did not appear overtly deceitful. As a member of the SFO's case team revealed:

> 'We didn't know precisely what our case was, we simply put in as much evidence as we thought was relevant. The liquidators, who were monitoring the trial, admitted that they were unsure of what the prosecution were trying to say. In fact, no one was sure what the prosecution were trying to say.' (DPR01/I, 1995)

As the prosecution's case developed, as such, and it became clear that there was no direct evidence of dishonesty and only marginally more evidence from which dishonesty could be inferred, it came to depend heavily on the disparity between DPR's commission charges and the service provided to its clients. This consequence could equally suggest incompetence on the part of the prosecution as much as it does confidence or belligerence. It is the latter interpretation, however, which seems more compelling, even if the prosecution's confidence in presenting its case, despite its obvious flaws, was to some extent borne of naiveté or incompetence, or just poor preparation. Although it is true that it was only once the trial began to unfold that a view within the SFO's Case Team emerged that its counsel 'should have either advised not to proceed, or, alternatively, adopted a different strategy and proceeded on a different indictment', other aspects of the case suggest a distinctive prosecutorial pugnacity (DPR01/I, 1995). DPR's regulating organisation, AFBD, for instance, had provisionally approved all of DPR's promotional material, including its presentation of its commission charges, but the prosecution still decided to proceed. Moreover, even if the witness who had died before the trial could have plugged some of the gaps in the prosecution's evidence, it is nevertheless instructive that the prosecution still resolved to proceed with the case, notwithstanding that it could have sought a ruling from the trial judge on the admissibility of the evidence during the preparatory hearings. Furthermore, the prosecution had, throughout most of the trial, sought to conceal the results of a DTI investigation into DPR under section 447 of the Companies Act 1985 which had found that the company had been conducted in a proper manner and recommended that no further action be taken (DPR01/TT, 1990: 25/6/90). To summarise, the most significant feature of the case was not the predisposition of the judge towards the defence or the jury's failure to deliver the 'right result', but the SFO's confident and bellicose approach to prosecution. As one member of the case team said in explaining the prosecution's strategy:

> 'We thought they should go down, but it was difficult to see what for. There wasn't a recognisable criminal offence, we waited for one to emerge. It was poorly constructed. Then we were 'gung ho', we would prosecute anything that moved.' (DPR01/I, 1995)

EXPANSIONISM AS A FRAGILE PHENOMENA

The above examination of the DPR Futures case was designed to complement the earlier discussion on the Guinness and Blue Arrow cases. Rather than focusing on the dimensions

of criminal justice expansionism, it aimed to illustrate the organisational ethos which seemed to underpin it. The observable symptoms of this were incomplete investigations, poor pre-trial preparation and rimose prosecutions, but beyond this there seemed to reside an organisational presumption in favour of prosecution. This presumption did at times appear to supervene any inherent weakness in the admissible evidence available to the prosecution. This is not to say that a presumption in favour of prosecution extended to all cases. Nor was it confined exclusively to the period before and immediately proceeding the second Guinness and Blue Arrow trials. Other cases were to follow which bore the same characteristics of insufficiently thorough investigations[7], deficient pre-trial preparation and fragmented prosecutions in the courts. These may have been symptomatic of at least a selective presumption in favour of prosecution, but this does not detract from the more measured and circumspect approach to prosecution which gradually overtook the SFO's operation after the Guinness and Blue Arrow trials (see the Gooda Walker case below).

Even during the period of criminal justice expansionism, specific cases were always vulnerable to defeat even before reaching trial. As was the case before the establishment of the SFO a number of features peculiar to serious fraud prosecution served to frustrate the SFO's attempts to publicly expunge the failures of the past and present itself as an organisation aimed at realising a deep commitment to prosecution. Amongst other things, these included insufficient allocation of resources to specific cases (see the De Spretter Futures case below), counsels' peculiar inclination to strongly recommend against prosecution[8] (see the Mayhew case below[9]), better opportunities to either abscond or simply to remain beyond the jurisdiction (see, for example, Widlake, 1995: 110-158; and the PCW affair) and the relative superiority of the bargaining position of defendants - characterised, for instance, by well-funded and committed legal representation (see the Mayhew case below; also see Shapiro, 1990).

One case which illustrates some of these themes and emphasises the contingent and fragile nature of criminal justice expansionism, was the SFO's aborted attempt to prosecute David Mayhew, a partner of Cazenove, one of the most established stock-broking firms in the City of London. The case highlights a number of important issues relating to the SFO's operation, especially the discrete pressures which propelled the Guinness case through the courts, but also the nature of the SFO's relationship with its counsel (for a more general discussion see Levi, 1993: 77-78). Although some of these issues will inevitably emerge as

part of the following discussion, no attempt will be made to develop them since the case's inclusion below is solely designed to illustrate how the micro-politics of specific cases served to frustrate criminal justice expansionism in the SFO's early years.

THE PRESUMPTION AGAINST PROSECUTION: R v DAVID MAYHEW AND OTHERS

Introduction

The case against Mayhew emerged from the DTI's investigation into the circumstances surrounding Guinness' take-over of Distillers in 1986. The take-over had been contested by Argyll, the owners of Safeways, and had been finely balanced right up until the closing day of the bid. The terms of each of the bids included a straightforward cash offer and a paper offer, but because the value of both Argyll's and Guinness' cash offers were less than the face value of their respective paper offers the success of either bid primarily depended on the value of the paper offers which were, in turn, dependent on the respective price of the offeror companies' shares. To make its offer more attractive Guinness had undertaken an illegal share support operation. This was done with the purpose (and effect) of inflating the price of Guinness shares; thereby increasing the value of its paper offer and therefore the likelihood of Distillers shareholders assenting their shares to the Guinness offer.

In addition to orchestrating an artificial inflation of the Guinness share price, Guinness's advisers (namely, Morgan Grenfell and Cazenoves) had also organised the purchase of Distillers shares by Guinness and its supporters. Under the circumstances, the Take-over Panel Code permitted up to 15 per cent of the offeree company to be purchased in this way (provided the purchases were disclosed).

The case against Mayhew was essentially that he, together with Thomas Ward (an American lawyer and director of Guinness) and Roger Seelig (a director of Morgan Grenfell), had purchased a tranche of Distillers shares in violation of the Code (with the effect of depriving Distillers shareholders of certain rights under the Code). The shares had been previously held by a subsidiary of Mercury Warburg Investment Management (MWIM) and had been released onto the market on an auction basis just two days before the bid. The bid was finely balanced at this stage and it was essential that Argyll were

prevented from buying the shares. The problem for Guinness was that it had already reached its limit and could not fund the purchase of more Distillers shares. Moreover, no bona fide purchasers, let alone any who would assent their shares to the Guinness offer, could be found to purchase the tranche at the price demanded by MIWM. To circumvent this problem the defendants, according to the prosecution, simply ignored the terms of the Code. Thomas Ward arranged for the Switzerland based Bank Leu to purchase the tranche through one of its subsidiaries, Pipetec. Guinness was to fund the purchase and Mayhew, through Cazenove, was responsible for executing it.

The case against Mayhew turned on whether he had been aware that the Pipetec transaction had been supported by Guinness. The circumstantial evidence strongly suggested that he knew that Pipetec was just a front for Guinness. Werner Frey, a director of Bank Leu, for example, was also a director of Guinness. In addition to this, Mayhew was aware that Robert Flemming (Distillers' advisers) had made extensive enquiries to find a bona fide purchaser but failed. Moreover, at the price MWIM were asking, a purchaser would be buying shares at a very expensive price and certainly one that could be bettered once the bid had ended. The facts also suggested that Mayhew had gone ahead with the purchase without first waiting for confirmation from Ward that Pipetec were prepared, and had the funds, to buy the shares. In short, although no direct evidence existed to incriminate Mayhew, there was a case to answer based on circumstantial evidence.

The Mayhew Papers and the Simmons and Simmons Memorandum

The SFO abandoned its prosecution against David Mayhew on February 7th 1992. The case against him had originally been severed from the main trial (involving Saunders, Ronson, Llyons and Parnes) on the order of the Guinness trial justice, Mr Justice Henry, and it was, it seems, always the SFO's intention to prosecute him.

To uncover the origins of the SFO's decision to abandon its case against Mayhew, it is necessary to go back to 12th April 1991 and examine the contents of a letter that Simmons and Simmons (Mayhew's solicitors) had written to Barbara Mills (the then Director of the SFO), urging the SFO to discontinue proceedings against Mayhew (GU03/C1, 1991). Apart from a suggestion that two witnesses from Bank Leu, who the prosecution intended to call, could not be relied upon to give evidence which would accurately reflect their witness

statements, the letter contained little of which the SFO was not already aware, but instead concentrated primarily on what was called 'the timing point'. The relevance of Simmons and Simmons' comments on this issue is marginal to the events that followed, suffice to say that Gordon Dickinson, the SFO's Case Controller, later dismissed it as 'an attempt by them to re-write for us our case statement' (GU03/IC1, 1991). The letter did, however, suggest that Mayhew had 'powerful answers' to some of the other parts of the prosecution's case which, predictably, caught the Guinness Case Team's attention. Dickinson and John Chadwick, the SFO's leading counsel on the case, were keen to encourage Mayhew's legal advisers to disclose as much of his case to the prosecution as possible and, as such, resolved to invite Simmons and Simmons to expand upon these 'powerful answers' in a written reply. Their efforts to this effect, however, were to have catastrophic consequences for the SFO's long-term aim of prosecuting Mayhew, exposing, in the process, a deep conflict between the SFO and its counsel.

Mills duly despatched a reply to Simmons and Simmons, inviting them to release the evidence upon which their assertion was based (GU03/C2, 1991). This, she stressed, was essential if the SFO was even to begin to act on Simmons and Simmons request not to proceed. As Dickinson had explained in a memorandum to Mills, 'the ball remains firmly in their court to give us the evidence they say they have, if they wish us to rely on it' (GU03/IC1, 1991). On 11th July Dickinson wrote a memorandum to Mills explaining that the SFO's counsel had informed him (on the basis of counsel-to-counsel discussions) that she would soon be receiving a 'lengthy and comprehensive memorandum' from Simmons and Simmons which would set out 'all the new facts Mayhew claims to be able to draw to your attention and which he thinks you will have to take into account in reviewing the prosecuting decision in his case' (GU03/IC2, 1991). Simmons and Simmons, however, did nothing of the sort and instead wrote back to Mills confirming the terms governing the submission of 'counsel-to-counsel memoranda'; conditions, in other words, which the SFO would have to comply with if it wished to receive the new evidence that Simmons and Simmons claimed to have in its possession. The terms were onerous. Amongst other things Simmons and Simmons insisted that, if the prosecution were to continue, the SFO could not make any reference at trial to the existence of the memo, nor to the fact that any of the people who had given information as part of witness statements, or even notes of possible witnesses contained within the memo had done so in the form that was being proposed, and, finally, that any documentation accompanying the memo could not be relied upon as

evidence at the trial, but would instead have to be proved in the normal way (GU03/C4, 1991). The implications of accepting the memo on these terms was unclear to Dickinson at this stage, although following the receipt of Simmons and Simmons latest correspondence he wrote to Mills alerting her to the serious problems which would arise if the memo was accepted on the above terms (GU03/IC3, 1991). The salient points are listed below and are highly instructive in light of the events which were to follow.

> 'Evidence is precisely that, and you cannot act on the basis of evidence you have seen and at the same time pretend (if you continue the proceedings) that you have not seen it.' (GU03/IC3, 1991)

'It would not be proper to accept that a defendant had the right to influence or control the way in which the prosecution deals with its case, or the use it makes of evidence available to it.' (GU03/IC3, 1991)

> 'Making the decision to prosecute (or not) is a public obligation which must be based on established evidence and information available to you and on which you can rely. This will not be the case if it is to be decided by a defendant that the information he is asking you to use will only be available to you if you agree in advance (and without seeing it) to use it in his favour.' (GU03/IC3, 1991)
>
> 'You have previously indicated to Simmons and Simmons that if the evidence which they think would influence the decision to prosecute, and which they wish you to take into account, they should reveal it. If there is a risk in that for the defendant, he can hardly expect to be given a blind indemnity which at the same time would bind you not to use potentially probative material.' (GU03/IC3, 1991)

Dickinson's concern was plain. If the prosecution were to accept the memorandum on the conditions that Simmons and Simmons had attached to it, the prosecution would be effectively allowing the defence to usurp its role and dictate the management of the case. Mills, for her part, was not prepared to submit to the terms of the memorandum, but this was exactly what happened. On 19th August 1991, Dickinson learnt to his surprise that counsel had not only approved a draft of the terms attached to the memorandum which had earlier been supplied to the SFO, but also a copy of the memorandum itself (GU03/IC4, 1991); notwithstanding that no instructions to that effect had been forthcoming from the SFO (GU03/C5, 1991; GU03/IC5, 1991). In a note to Mills the following day he explained:

> 'It now transpires that counsel have had a document which for the present Mayhew refuses to give to us, even though we had been at pains to refuse to have anything on a counsel-to-counsel basis.' (GU03/IC4, 1991)

On 4th September 1991, Gordon Dickinson, Detective Chief Superintendant Botwright, the senior police officer working on the case, and the SFO's counsel finally met to discuss the circumstances in which the SFO's counsel had received the Simmons and Simmons memorandum and how the prosecution should now proceed (GU03/CC1, 1991). Counsel, who had seen the memorandum, claimed that the prosecution was 'a proper case to abandon'. More importantly, however, since Nick Straus (Mayhew's counsel) was still not prepared to release the memorandum if it could be used at trial, the SFO's counsel insisted that the SFO, contrary to its instructions, would have to accept the attached conditions if they were to have material which the prosecution 'would not otherwise have the benefit of' (GU03/CC1, 1991).

Dickinson disagreed and replied that 'there was a flaw in the logic of all that' (GU03/CC1, 1991). He urged counsel to change its conciliatory position in relation to the Mayhew camp and tell them that 'there was no reason why we should agree to terms like this in order to get it, as it was for Mayhew to decide whether he wanted to reveal his hand or not' (GU03/CC1, 1991). He added that:

> '...it had been made clear to Mayhew's solicitors that if they wanted the reconsideration they sought to be based on what they say is new material, they must give it to us. Alternatively they may not wish to do so, but ask us to reconsider on the basis of submissions relating to the present material. We were waiting for them to decide which it was to be, and it is a disturbing departure from that which is now presented.'
> (GU03/CC1, 1991)

Chadwick, however, felt professionally obliged to remain faithful to the understanding between counsel and Simmons and Simmons despite the fact that this meant he and the counsel were now acting in direct conflict with the SFO's explicit instructions and, as Dickinson had warned earlier, allowing the defence to dictate the management of the prosecution.

'...if the SFO now fail to proceed on the basis of having the memo, it will cause enormous surprise, and Simmons and Simmons will see it as a breach of the understanding which led them to hand over the memo. Counsel all feel bound by the terms of the letter. It was confirmed that it was intended that the approval of the letter by counsel was to be a firm commitment to it, and that the Mayhew camp thought that we were all committed to it, and that was the basis on which they had handed the memo to Miss Gloster. Therefore, if the Director did not wish to see the memo on these terms, it would be necessary for all counsel to be discharged from the case, and for the memo to be handed back by counsel to the Mayhew team.' (GU03/CC1, 1991)

Thus, the SFO was now set against its own counsel, who astonishingly had aligned themselves with Mayhew's advisers, and whose conciliatory tactics both police and the SFO's staff were at pains to understand. As Detective Chief Superintendent Botwright observed, any evidence in Mayhew's possession which was helpful to his case would have been presented at his dismissal hearing which had failed on 28th April 1989 (GU03/IC6, 1991). Moreover, counsel had denied that the memo contained evidential material; a highly ambiguous claim given that Simmons and Simmons' correspondence had intimated throughout that it would contain new evidence, including documents, supportive of Mayhew's innocence. As Botwright observed:

'The Simmons and Simmons letter...implied there may be documents which the prosecution may seek to rely on, but this is incongruous with counsel's view that there is nothing in the memoranda of an evidential nature or to the benefit of the prosecution. I therefore failed to see the point of the letter' (GU03/IC6, 1991)

Counsel also assured the SFO that the memo contained nothing against Mayhew's interest, nor much else which was not either argument on the present evidence or assertion that he had further evidence at his disposal (GU03/CC1, 1991). This, in effect, was a further admission that there was little of evidential value in the memo and, as such, tended to undermine counsel's view that the prosecution should be terminated on the basis of the memorandum alone, given the significance that Dickinson had attached to evidence in his earlier memo to Mills.

Chadwick, once again emphasising his alignment with Mayhew, nevertheless continued to impress upon the prosecution that termination was the only conceivable course of action. He began by arguing that on this issue Mayhew and the SFO's interests were identical. As Dickinson later recorded, Chadwick explained to the conference that 'it was in our interests as well as Mayhew's that we should [see it]', since 'it was not in out interests to embark on a prosecution which will fail, and it would be a blinkered approach to stand on the prima facie test case' (GU03/CC1, 1991). More significantly, counsel added that 'the case was becoming very stale, and the events were going to be six years old by the time Mayhew's case is heard' (GU03/CC1, 1991). This argument is illuminating for two reasons. Not only does it reveal a resistance to prosecution independent of the Simmons and Simmons memorandum, but it also represents a recognition that delays primarily caused by the defence could be allowed to defeat the prosecution (see Levi, 1993: 94). As Botwright later argued:

> 'There have been many factors which have caused delay in the Guinness trials but none have been the fault of the prosecution. I would suggest, however, that considerable delay was caused by Mayhew and his advisers in the manner in which they have conducted the defence. From his first appearance at court when he successfully applied to his solicitors' refusal to allow the interview of witnesses in their absence and severance of trial are illustrations of reasons for the delay, but the voluminous correspondence serves as the best record of an arrogant and difficult attitude displayed by Simmons and Simmons' (GU03/IC6, 1991).

Chadwick, meanwhile, realised that the issues at stake went beyond the simple legal considerations of prosecution and that to persuade the SFO of the merits of abandoning the case his argument would have to confront the extra-legal imperatives which, throughout, had driven the Guinness prosecutions:

> 'The convictions in the first trial showed that we can prosecute high-profile City defendants to conviction. We hope to drive that point home further in the next trial.' (SFO/CC1, 1991)

The implication was plain. As far as Chadwick was concerned the SFO had done enough to demonstrate its capacity to meet the expectations which at once had accompanied and produced its creation. The first Guinness trial had produced four convictions. The second

trial against Seelig and Spens was imminent. And that since the case against Mayhew was weaker than the other Guinness trials and more difficult to present to a jury (GU03/CC1, 1991), the political logic which had driven the process now dictated its cessation. As Dickinson later recorded, Chadwick concluded:

> 'Mayhew is a much more high-profile target, who has his employers behind him. It would send the wrong message to the City if we pursued him and failed to get a conviction.' (SFO/CC1, 1991)

Chadwick's comments illustrate the absurd conclusion which followed from the logic of his reasoning; namely that a decision not to proceed as opposed to prosecution would be a far more effective strategy of demonstrating to the City that it was not beyond the reach of criminal prosecution. Dickinson was unimpressed and, had any other viable option been open to him, was still committed to proceeding without accepting the memorandum (GU03/CC1, 1991). This, however, would have served to defeat the very reason the SFO wished to proceed. As Barbara Mills explained to Stephen Wooler, the Legal Secretariat to the Law Officers:

> 'This would mean losing prosecuting counsel, and instructing fresh counsel. It would create no doubt a storm of protest, and might invite judicial review proceedings. It risks also the loss of counsel from the imminent trial.' (GU03/C6, 1991)

In short, proceeding with a prosecution threatened to cause unacceptable delays to the Guinness prosecutions, jeopardising the second Guinness trial as well as the third. There was no other option but to accept the memorandum and abandon the prosecution.

To summarise, even when a presumption in favour of prosecution seemed to characterise the SFO's organisational ethos, prosecution would not always be forthcoming. This, significantly, in the Mayhew case, was in spite of all the necessary judicial obstacles to prosecution having been cleared and, even more importantly, notwithstanding the presence of a localised pressure to prosecute. More generally, the threats to prosecution during the age of criminal justice expansionism were numerous and specific (see, for example, Levi, 1993: 71). That is not to say, however, that the pressures frustrating prosecution were either universal to all criminal prosecutions or exclusive to the SFO's cases. A more accurate

interpretation is that the reasons behind frustrated prosecutions were at least exaggerated in, or more peculiar to, the SFO's cases. To this effect, it is improbable that Simmons and Simmons' (who were generously funded throughout by Cazenove) successful attempt to obstruct and then finally control the management of the prosecution, which had the spectacular effect of driving a wedge between the SFO and its counsel, would have been reproduced in a conventional criminal prosecution. The great irony is that for conventional criminal defendants most defence solicitors, like Simmons and Simmons, tend to regard their clients as undeserving of trial, albeit for very different reasons (see McConville, Bridges, Pavlovic and Hodgson, 1994).

EXPANSIONISM IN DECLINE: THE LEGAL RETREAT

As we saw in the last chapter, the conclusion of the second Guinness and Blue Arrows trials marked a watershed in the history of the SFO; the beginning of the second crisis to beset serious fraud prosecution within a decade. This second crisis (which in a sense was simply a reaction to the excesses of the first) differed significantly from the first in terms of its observable impact on the infrastructure of serious fraud prosecution. The first crisis had produced the SFO, the second, on the other hand, had little observable effect on serious fraud prosecution. Although the extensive criticism of the SFO in the news media and the two Government led reviews which questioned its existence as a separate institution gave a sense of crisis, the SFO nevertheless survived in much the same form. Outwardly, as such, little had changed. In other words, if there was a crisis it did not seem to be serious.

There is some merit in this interpretation. The second crisis did not strike at the heart of the Government's legitimacy as the first crisis had done. However, once we go beyond the mere form of serious fraud prosecution and explore what was happening within the SFO and the legal environment in which it operated a sense of crisis becomes more apparent. The infrastructure put in place during the first crisis might have remained the same, but its purpose and priorities seemed to experience a marked change.

To appreciate the contours of this change, a grasp of the elemental importance of the scope of criminal investigation and prosecution to these crises is essential. As we saw in Chapters II to V, the forces which drove the first crisis had produced an expansion in criminal justice intervention. Once these forces began to dissipate, however, and leave exposed the

contradictions inherent within criminal justice expansionism, the second crisis began to unravel. As we saw in the last chapter, its major effect was to reverse the most profound consequence of the first crisis. That is to say, it facilitated the abandonment of expansionism by realising the imposition of limits on the type of cases which would, in future, be prosecuted. Criminal justice expansionism, in other words, had at once been a product of the first crisis and a cause of the second, but also a force of its own demise.

The demise of criminal justice expansionism at once produced and involved two major changes to the SFO's operation: one ideological, the other technical. To the former effect, the SFO's survival as an independent organisation during the early 1990s, if not dependent upon a reinvention of its public image (see Chapter VI), did eventually coincide with a change in its presentation to the public. No longer did it promote itself as the police force of the City of London, but rather the guardian of small investors who had placed their money with equally small investment firms (Atkinson, 1997). The SFO, having once been accused of 'thinking too big, was now humbled into 'thinking small'.

To the latter effect, this shift in the SFO's presentation coincided with (but was not the cause of) a series of related changes to its organisational ethos, its operational priorities and the legal environment in which it functioned. These changes converged on the event, serving at once to represent and impose a retreat from criminal justice expansionism.[10] As we saw in the last chapter this, first and foremost, involved a more structured approach to co-ordinating the division between regulatory action and criminal prosecution, but this was not the only dimension of the retreat, for the SFO also seemed to adopt a more measured and circumspect approach to prosecution (see Gooda Walker below) and, perhaps more significantly, found itself faced with a far more hostile legal environment which, in some instances, served to impose fundamental constraints on how it prosecuted cases (see Levitt below).

The following discussion aims to illustrate some of these trends. It begins with a short examination of the SFO's investigation into the Lloyd's managing agent, Gooda Walker Limited. This is followed with an explanation of the prosecution of Roger Levitt, an account of the SFO's refusal to accept the 'mis-selling' of pensions scandal for investigation and finally a brief analysis of the De Spretter Futures case.

A CAUTIONARY TALE: THE GOODA WALKER CASE

As we saw earlier the SFO's prosecution (but not the prosecution itself) of Marcus Deller and the other defendants in the DPR Futures case seemed rash and ill-considered. This unplanned, but confident approach to prosecution provides a distinctive contrast to the Gooda Walker case. Since with Gooda Walker, caution, deliberation and circumspection rather than confidence, poor preparation and insouciance characterised the SFO's management of the case. This was true from the outset. When the case was referred to the SFO it chose to register the case for extended vetting, rather than accept it for investigation. As an operational measure to establish whether the evidence supported the commission of any substantive criminal offences, the tactic was prudent and justified on the basis of the available evidence. It not only gave the SFO the opportunity to explore what information was available, but also to scrutinise and authenticate the information already in its possession. What is significant, however, is the use of the procedure itself. Cases were rarely placed in extended vetting (even where the papers delivered to the SFO on referral failed to demonstrate the commission of any substantive criminal offences - see De Spretter Futures below), and none had been placed in vetting for as long the Gooda Walker case which was finally accepted for investigation four months after its initial referral to the SFO. Moreover, when the decision was finally taken to formally investigate, it was not taken on the merits of the case alone, but rather after a full account had been taken of the political as well as the operational ramifications involved in proceeding with the case. The SFO, in short, was not prepared to commit itself to an investigation without first assessing the effect it would have on its public image and also its relations with some of the other regulatory institutions. Similarly, once the case was accepted for investigation, a deliberate decision was taken to narrow the investigation. The decision was taken, in part, on the basis of a considered view of the evidence for the purpose of enhancing the SFO's chances of securing a conviction if the case came to trial. What was significant, however, was that it was also taken with a view to managing any criticism which might follow from taking the case further by closing off other lines of inquiry which might compromise the SFO's qualified support from Lloyd's and the news media.

These features of the SFO's management of the case in themselves suggest an organisational ethos with distinctive differences from the one that characterised the SFO's

operation in the late 1980s and early 1990s. An ethos in which the SFO, conscious of its own vulnerability, had finally become sensitive to the changing political landscape of commercial fraud prosecution, adapting its operation to a climate in which intolerance of inaction had been replaced by an intolerance of failed, expensive and economically damaging prosecutions. What is even more striking, however, is that the SFO took such a circumspect approach in the face of considerable pressure to prosecute. Not only were the DTI and, initially at least, Lloyd's itself encouraging of a prosecution but, more significantly, a prosecution was, for a time at least, of immense importance to the Lloyd's market - an institution of central importance to the City of London as a leading financial centre. To understand why, it is necessary to examine the financial crisis which hit Lloyd's in the late 1980s and the early 1990s, and the strategy which it embarked upon to manage the crisis.

The Crisis at Lloyd's

Until 1988, Lloyd's had enjoyed an unbroken run of profits for twenty years (Parker-Jervis, 1992). According to a study by the stock-brokers, Hoare Govett, which compared the performance of the market with the corporate sector, Lloyd's profits were significantly higher than those generated in the insurance industry as a whole (Buckingham, 1992b), a feature which, in part, explained Lloyd's attraction as an investment for the wealthy middle classes.[11] The £649 million profit posted in 1986, however, the largest ever for any single year, (Springett, 1993b), was to presage an almost immediate reversal in its fortunes. A record loss of £510 million in 1988 signalled what was to follow (Parker-Jervis, 1992; Springett, 1993b), but the full scale of Lloyd's financial crisis was not to become fully apparent until the early 1990s because of the market's practice of reporting its results three years in arrears.

The depth of its crisis was truly startling. From 1992 to 1994, Lloyd's reported losses of £2.06 billion, £2.91 billion[12] and £2.05 billion for the years between 1989 and 1991 (Springett, 1993e; Lapper, 1994c); bringing its cumulative losses for the period to over £7 billion. The scale of its losses, unprecedented in its three hundred year history, was reflected in its effect. It produced a mass of legal actions from aggrieved names and was large enough not only to force profound changes on the market - far more radical than the Lloyd's

Act of 1982 (see Clarke, 1986: 52-89 and Levi, 1987: 87-88) - but also to threaten its global solvency, and therefore its existence.

Lloyd's response to the Crisis

Lloyd's response to its financial crisis took two forms. The first, a cathartic exercise, involved a series of investigations into the causes, nature and pattern of the losses which it had suffered. The most wide-ranging of these was Peter Walker's general inquiry into the pattern of losses at Lloyd's (see below), but it also comprised a succession of more localised investigations (one of which led to Gooda Walker's referral to the SFO) into the syndicates that had suffered the greatest losses. The second limb of Lloyd's response to the crisis was more forward looking and involved a series of general reviews to its regulation and its method of business, aimed at devising a coherent strategy which would enable it to trade out of its problems.

Since there was no grand design to Lloyd's response to its crisis, there is a temptation to regard the succession of reviews and investigations which comprised this response as an *ad hoc*, dislocated series of measures. To understand the significance of the Gooda Walker case to the following discussion, however, it is important to resist this interpretation. Although there was no over-arching programme to its response, there was a common agenda. The reviews and investigations were, in other words, aimed at producing a similar effect: namely to manage the crisis, to neutralise the widespread criticism of the market and, more importantly, to secure its existence. To this effect, the maintenance of confidence among those who insured risk within the market and those who provided its capital base was of prime importance. This involved demonstrating that losses on the scale of the late 1980s and 1990s would never be repeated. To demonstrate, in other words, that its losses were not attributable to the intrinsic nature of the market, but rather to the peculiar circumstances of the 1980s. An objective to which Lloyd's response was ideally suited since it involved isolating the principal causes of loss as aberrations from conventional market practice and showing that the reformed Lloyd's was structured to resist a repetition of these aberrations.

Regulatory Re-Organisation and Corporate Capital

The first observable sign of change to the regulation of Lloyd's was David Rowland's (the then chair of Britain's largest broker, Segdwick) wide-ranging report produced at the beginning of 1992. Regulation had long been a contentious issue at Lloyd's (Clarke, 1986: 52-89); its structure having been revised as recently as 1982 in the Lloyd's Act. This served to confirm the Ruling Council's status as the regulatory authority for the market but, in doing so, fused the regulation of Lloyd's with its commercial function, since the Council was also responsible for running the market and devising its strategy. Rowland recommended separating the two functions with the creation of a more independent regulatory régime alongside a market board. The Council initially rejected the proposal, but it was forced to reconsider after a public rebuke from the leading names' body, the Association of Lloyd's Names (Parker-Jervis, 1992). A working party was duly commissioned to re-examine the proposal, although Rowland's recommendation was only implemented as part of a series of measures in a business plan published some months later (see below).

Rowland's subsequent appointment as the chair of Lloyd's, together with Peter Middleton (former head of the travel group, Thomas Cook) as chief executive served to further accelerate the process of change. The two began with a business plan - the first in Lloyd's history and generally regarded as 'a blueprint for Lloyd's survival' (Springett, 1993b) - which was published in April 1993. Amongst other things, the plan set financial targets, proposed that cash calls on names for 1990 be minimised and delayed, set out measures to improve the standards of professionalism in the market, and recommended cuts in staff and a reorganisation in the commercial management of Lloyd's. Several recommendations, however, were especially significant to Lloyd's survival; namely its plans to isolate the billions of dollars of old liabilities from US asbestosis and pollution claims, a declaration of its commitment to pursuing a negotiated solution to the outstanding legal disputes between names' representatives and managing agents (see below) and, most importantly of all, its proposal to allow corporate capital to enter the market on the basis of limited liability (Springett, 1993a; Lapper, 1993a).

The Pattern and Nature of Loss, Investigations and Disciplinary Action

The second limb of Lloyd's response to its historic losses was to organise a series of investigations into the management of those syndicates which had suffered substantial losses. These were to perform an important role in the management of the crisis, complementing the policy changes that Lloyd's management was attempting to drive through. Although many names had suffered loss (in 1989, for example, three out four had lost more than 5 *per cent*) - some syndicates had remained profitable throughout the crisis years. In fact, 146 of the 390 active syndicates produced a profit after personal expenses. The pattern which gradually emerged during the early 1990s was that a substantial amount of losses were concentrated in a relatively small number of syndicates. Thirty *per cent* of losses in 1989, for instance, fell on just five of the four hundred and eighty seven syndicates (Parker-Jervis, 1992). The most badly effected syndicates and managing agents were those that had become deeply involved in the London Excess of Loss Market.[13] Two managing agents, Gooda Walker and Feltrim, both of which had taken on substantial excess of loss risk, represented 37 *per cent* of the losses (Parker-Jervis, 1992). Gooda Walker alone represented about a seventh of the total losses between 1988 and 1991 (Lapper, 1994b). Thus, investigations into specific syndicates and managing agents which might unearth mismanagement, misconduct, or even dishonesty, would have the effect of localising Lloyd's crisis; serving to isolate as aberrant those syndicates and managing agents which had made such a substantial contribution to Lloyd's losses.

The process of distinguishing the 'good' from the 'bad' was, in several respects, of crucial importance to the viability of Lloyd's plans to attract corporate capital, a pre-condition of its future existence. The financial crisis had produced a mass exodus of names from the market - 2,070 in 1992 (Scott, 1993) - with none signing up to replace them (GWR01/VN1, 1993). This had the effect of reducing Lloyd's capital base to the extent that there was a danger of the capital available to the market declining beyond the critical capacity necessary to compete in international commercial insurance and reinsurance markets (Lapper, 1993a). Lloyd's capacity of £10.6 billion in 1990, for instance, had shrunk to £8.75 billion in 1992, with some insiders, in 1993, warning that it might fall to as little as £6 billion in 1994 (Springett, 1993d). Corporate capital was the only means of making good the short-fall.

Even as late as June 1993, however, there was still speculation that the planned introduction of corporate capital might fail. Although, according to some civil servants at the DTI, Lloyd's brokers had a 'vested interest in Lloyd's survival' which would lead them to

establish 'corporate vehicles to introduce extra capacity', the threat of a chronic loss in confidence was still considered to overshadow the market (GWR01/VN1, 1993). If the Council were unable to deliver any of the main planks of its business plan (especially the ring-fencing of US asbestosis and pollution claims and the improvement in the standards of professionalism within the market) or if the 'errors and omission' disputes were to continue, it was feared that companies might decided that investing in Lloyd's was simply too great a risk (GWR01/VN1, 1993). As Roman Cizdyn, an analyst from Smith New Court asked: 'How much corporate capital will be attracted? Rates are going up, but it is not clear how much business there is' (cited in Crowe, 1993). Despite Rowland's insistence that companies from both sides of the Atlantic were queuing up to join the market, according to a report in *The Guardian*, some 'insiders' at Lloyd's were nevertheless sceptical that institutions would invest in Lloyd's since the end-of-year deadline for a decision was too short to assess an uncertain and highly risky investment (Springett, 1993d).

Much of the news media's analysis of Lloyd's losses had tended to adopt Lloyd's favoured explanation and locate them outside the market (see, for example Laurance and Buckingham, 1992; Springett, 1993b) in a succession of natural and corporate catastrophes around the world which forced it to make provisions for a deluge of future claims,[14] and pollution and asbestosis claims relating to policies written many years earlier which served to produce substantial claims on Lloyd's. Although these were the immediate cause of Lloyd's troubles, the explanation tends to ignore the important contribution of Lloyd's itself. According to civil servants within the DTI responsible for overseeing the market, a deliberate policy of over-expansion pursued within Lloyd's during the 1980s aimed at increasing its capacity to neutralise the 'long tail risks' posed, amongst other things, by pollution and asbestos claims in the United States, which Lloyd's were well aware would 'come home to roost', served to significantly aggravate the consequences of the natural and corporate disasters (GWR01/VN1, 1993). It increased the amount of capital in the market, leading to a disastrous increase in competition (Lapper, 1993a).

Names, on the other hand, were tending to locate Lloyd's crisis in widespread negligence, misconduct and even fraud in the market, aggravated by a lack of regulation. These were repeatedly recorded in the news media. A report in *The Observer*, for instance, recorded how names were 'speaking darkly of fraud', and quoted one name as saying: 'When I joined, the byword was *fidentia*. Someone put an 'L' in the middle and now it's *fiddlentia*'

(Parker-Jervis, 1992). Similarly, the chair of the Supergroup, a co-ordinating committee for some 30 action groups, said of the business plan: 'We welcome the report. It is a frank admission by Lloyd's that its problems have been of its own making because there has been no proper regulation' (Springett, 1993a). These criticisms, as much as the legal actions taken by Lloyd's names, had to be managed as part of Lloyd's plan of survival. As David Coleridge, the chair of Lloyd's until 1993 said at the 1992 Annual General Meeting:

> 'I detect an increasing concern that the activities of a much-publicised minority can weaken everyone's sympathy for them and harm the reputation of us all, on which our future depends.' (David Coleridge cited in Parker-Jervis, 1992)

Names had to be pacified and kept on as names notwithstanding the planned introduction of corporate capital. As Rowland remarked at the market's June 1993 annual general meeting in an attack on those members who were ready to 'put out the lights in Lime Street and walk away from the problem':

> 'It would mean greater suffering for the membership of this society and consequences far beyond the membership. Tens of thousands of jobs lost; the end of London as the international insurance centre and a further illustration to the world of the terminal decline of Britain as a great trading nation.' (Rowland cited in Springett, 1993c)

Confidence was therefore crucial to Lloyd's survival. To maintain confidence Lloyd's had to demonstrate a number of things. It had to show that it was making progress with an out-of-court settlement with Lloyd's names. It had to show that, as far as was possible, old claims from asbestosis and pollution would be isolated. Most important of all however, was the introduction of the business plan, in respect of which the support of names would be central.

A general inquiry under the direction of David Walker,[15] which had been established as a direct response to the serious allegations made by Lloyd's names, had already found that professional members on a number of Lloyd's syndicates had not siphoned off the best risks for themselves and that business had not been 'churned' to generate commissions and fees for brokers and underwriters at the expense of syndicate names in the LMX spiral (Buckingham, 1992a). No one at Lloyd's had yet been accused of dishonesty. To optimise

the likelihood of names agreeing to the business plan the discrete investigations at Lloyd's had to be seen to be as thorough and severe as possible. As a senior lawyer at the SFO later remarked:

> 'Civil proceedings will hit the E & O insurers (much of the cover placed spirally with the very names who are suing); whereas a criminal investigation and trial is viewed as merited 'punishment' for the agents who are thought to have cynically disregarded names' interests and lined their own pockets.' (GWR01/IC3, 1993)

The Investigation into Gooda Walker

Gooda Walker came under close scrutiny and was subjected to a series of investigations. The first of these, a Lloyd's inspection into Gooda Walker, was soon followed by Derek Walker's resignation as an underwriter and chair of Gooda Walker Ltd., the managing agents of several syndicates. On 4th October 1991, a winding up resolution was passed on Gooda Walker and its two members agents were put into liquidation. A week later, on 10th October 1991, the Council of Lloyd's appointed Gooda Walker Run-Off Ltd. (G.W. Run-Off) to take over Gooda Walker's management of the syndicates. Soon after its appointment, G.W. Run-Off became concerned about certain 'time and distance' reinsurance policies purchased for Gooda Walker syndicates and therefore, on 31st December 1991, instructed Ken Randall, a former head of regulation at Lloyd's, and later of Randall Insurance Services Limited (Randall Insurance), to undertake a thorough investigation of how the syndicates had been managed (GWR01/C1, 1993).

This, in the first instance, produced a formal disciplinary complaint to Lloyd's which duly instructed its Solicitors Office to launch a formal investigation into the operation of Gooda Walker. Meanwhile, the losses at Lloyd's, and Gooda Walker in particular, were beginning to unwind. A 164 *per cent* loss on one of Gooda Walker's syndicates (number 164) triggered the establishment of a Loss Review Panel, set up by the Council and led by Kieran Poynter of Price Waterhouse, to report on the circumstances leading to the losses. This culminated in report by the accountants Price Waterhouse on 29th September 1992 which blamed Gooda Walker underwriters for not appreciating the exposures under the LMX spiral, for under-reinsuring and under-reserving and for failing to warn names of actual losses and the true state of the syndicates financial position.

G.W. Run-Off finally received a detailed report from Randall Insurance in early 1993. It findings, in conjunction with the scale of the losses suffered by Gooda Walker names and 'the public interest in the proper operation of the syndicates' prompted G.W. Run-Off to refer the case to the SFO (GWR01/C1, 1993; GWR01/IC2, 1993). Randall's report was scathing of Gooda Walker's management; alleging that many names (the membership of one of Gooda Walker's syndicate, 290, grew tenfold in the 1980s) had been attracted to its syndicate by illusory profit figures that were artificially inflated by the use of time and distance policies. These policies are used widely by long-tail syndicates as a means of discounting their reserves against future claims. The policy-holder pays a premium which is invested by the reinsurer. The proceeds are repaid at an agreed future date to meet claims as they arise. In effect, it is a way of spreading projected losses over many years as an alternative to discounting reserves. However, according to Randall, the time and distance policies purchased by Gooda Walker via Pinnacle, a Bermuda-based reinsurer, were used to inflate the profits of the Gooda syndicates. The report stated that: 'Virtually all of Syndicate 164's profits for the 1980, 1983 and 1984 years of account resulted from the benefit taken from T & D policies.' Similarly it revealed that 'all of Syndicate 290's profits for the 1981, 1983 1985 and 1987 years of account' were a result of manipulation. And finally, Randall argued that a loss of 15 *per cent* of premium income on syndicate 290 was transformed into a profit of 38 *per cent* by the use of time and distance policies.

Thus, on 14th April 1993, nearly two years after Lloyd's had first begun to investigate Gooda Walker, the case was finally referred to the SFO. However, rather than immediately accepting it for investigation, the SFO merely registered the case for extended vetting on 20th April 1993; a status which permitted the SFO to continue examining the case without formally accepting it for investigation. This was to last until 13th July 1993 when the SFO finally accepted the case for investigation.

There was no obvious or immediate political reason restraining the SFO from formally accepting the case for investigation, since Lloyd's senior management had been in constant contact with Randall throughout the duration of his investigation and had also given G.W. Run-Off's referral its seal of approval (GWR01/IC2, 1993; see Biddencare above). In fact, Lloyd's approval of the SFO's involvement and its subsequent gentle encouragement to the Office (in the form of unsolicited offers of advice and assistance) may, to some extent,

explain the SFO's decision to use the rare procedure of extending vetting. Since, as there were few staff at the SFO with sufficient knowledge to fully understand the obscure detail of Randall's substantial report, the conventional vetting mechanisms within the SFO were not adequately equipped to specify the commission of any substantive criminal offences (GWR01/IC1, 1993; GWR01/IC2, 1993; GWR01/VN2, 1993).

The SFO and the DTI, it seems, were also under a general pressure to show that action was being taken in respect of Lloyd's and to assist the Government in its bid to ward of the growing controversy surrounding the management of Lloyd's. The note of a meeting between staff from the DTI responsible for overseeing Lloyd's and the Gooda Walker case team at the SFO on 10th June 1993, for instance, recorded that:

> 'Disqualification proceedings based on cash insolvency only (no funny business) might be a handy public relations move to show something is being done, even though we agreed that Gooda and Walker have nothing to lose by disqualification, as both are retired and/or in hardship' (GWR01/VN1, 1993).

And later that:

> 'Richard Hobbs' [responsible for advising ministers on Lloyd's generally and its global insolvency] view is that an investigation into Lloyd's now would buy political time' (GWR01/VN1, 1993).

The DTI 'was generally encouraging' of a full SFO investigation into the case, urging them to suspend their normal time limit for criminal offences, because of the 'long-tail' risks involved and the three year accounting period practised at Lloyd's (GWR01/VN1, 1993).

The SFO for its part, however, were cautious; fully aware that it alone would bear any criticism if the case was not prosecuted through to conviction. As Tricia Howse wrote:

> 'If the SFO were minded to initiate a wide-ranging investigation it would seem the DTI would be delighted, but if we failed to choose specific and prosecutable issues we would of course be on our own.' (GWR01/VN1, 1993)

A further more powerful, if less immediate, pressure was the solvency of Lloyd's itself. At the time of the case's referral to the DTI, Richard Hobbs was in the process of writing a 'what if' paper for ministers. Lloyd's worst results were yet to be reported. No new names had been recruited and, as such, it was crucial for Lloyd's to attract corporate investors. This was by no means a certainty. Although brokers had a 'vested interest in Lloyd's survival and will set up corporate vehicles to introduce extra capacity', there was still a danger of a chronic loss in confidence. If the Council were unable to deliver any of the main planks of its business plan, or if the E & O disputes were to continue, investors might avoid placing money with Lloyd's (GWR01/VN1, 1993). Moreover, Lloyd's was coming under pressure from investors in the United States, who were encouraging the Securities and Exchange Commission to consider whether Lloyd's were marketing securities illegally. Given that the DTI, although 'impressed' with Rowland and Middleton, had accepted that the previous chair and chief executives were 'crooks', the state and the DTI faced an upwards struggle (GWR01/VN1, 1993)

Two months after the case's referral, the case team had identified two possible avenues for investigation - general complaints from names that either Gooda Walker's accounts or its advertisements relating to the nature of the risks involved in its syndicates had misled them, and the probity of the commutations - but even these did not promise to support any 'suspected' criminal offences. However, as Tricia Howse, an Assistant Director of the SFO and Case Controller on the Gooda Walker case, wrote, in respect to the series of allegations from names that Gooda Walker had misled them:

> 'I honestly cannot see yet what offences we can suggest are worth SFO investigating here. A lot of the complaints are very old, general or at worst anecdotal' (GWR01/VN2, 1993).

This was not to deny, however, that more specific and less ambiguous complaints would later surface. On 31st August 1993, for instance, just over two months later, Christopher Rawson, a former Member of the Court of Common Council and an Alderman of the City of London, gave a statement to the police which was damning of Anthony Gooda's conduct. Rawson, an underwriting member of a number of syndicates, had originally been a member of the Leslie and Godwin Syndicate but, after growing dissatisfied with his syndicates' performance, decided to follow up Anthony Gooda's approach to join his group of

syndicates (164, 290, 295, 296, 298 and 299). Rawson's belief that the Gooda's syndicates would perform better was based on their recent history of successful results coupled with a clear indication from Gooda Walker's prospectus' of future profitable results and, in the short term at least, his optimism was warranted. Three profitable years followed, but in 1988 Gooda Walker's results showed a huge loss and in 1991, as a consequence, he was called upon to pay £156,732. On 17th July 1991, he met with Gooda whereupon he claimed to have been told that he had 'done the correct thing increasing his underwriting for 1990 and 1991, and that he was certain to get his losses back'. Moreover, he claimed to have received a similar assurance at a gathering of Gooda Walker names on the 25th July 1991. As a direct of these assurances, Rawson stated that he 'made arrangements to carry on as a member of Lloyds''; forwarding £172,327 to cover his solvency. To this £12,300 was deducted from his 1987 accrued profits in June 1990 to pay Syndicate 298, the first 1988 cash call, making a total of £195,627 paid to Gooda Walker. Within seven weeks Gooda Walker had gone into voluntary liquidation. Rawson concluded from this sequence of events that Gooda 'must have known this was about to happen when at the aforesaid meeting he informed the gathering that the worst was over and the losses would not continue for the year 1989' and that 'he only made those claims in order that names would continue to underwrite in his syndicates therefore paying for the losses he knew were coming.' Rawson added that Gooda Walker's management 'were aware of the imminent losses for a considerable period of time and had massaged their accounts and results to show profits over several years, thereby using these false results as a means of inducing people to join their syndicates' and also 'to obtain their profit commission even though the group was actually running at a loss' (GWR01/SW1, 1993).

A similar picture was beginning to emerge in respect of the commutations. One of the possible lines of investigation, for instance, concerned the possible misuse of cash calls on names made on account of Hurricane Hugo. The money had been used to pay for the reinstatement premium for the commuted policies: the question was whether this was proper. To this effect, one of the police officers working on the case was able to establish that the use of the money was, according to Tricia Howse at least, 'probably' legitimate, since the money from the commutations had been used to reduce an overdraft which had itself been run up to pay the claims on Hurricane Hugo. In short, the commutations had been used to bridge the gap between the cash call and the names' reduction of the overdraft (GWR01/VN2, 1993).

One of the reasons for the lack of genuine leads may have been the SFO's reliance on the earlier Lloyd's and Randall Insurance investigations for information, which were themselves highly selective. Bob Hewes, Deputy Chief Executive at Lloyd's told John Knox, Deputy Director of the SFO, for instance, that Lloyd's had concentrated on the commuted time and distance policies 'because of the recent occurrence of them and because they contained clearer indications of deceptions of auditors' (GWR01/IC2, 1991).

The question eventually arose whether to accept the case for investigation. The scope of any potential investigation was crucial to the decision. In a report to the Director Tricia Howse, the case controller, recommended that the SFO delay its decision to accept the Gooda Walker case for investigation. This, she stated, was the best course of action since there was yet no clear evidence of a criminal offence and because if a formal investigation were undertaken it might create an unrealistic expectation that the SFO would uncover everything that had gone wrong at Lloyd's.

> 'This would be a high profile, complicated investigation which would raise expectations of a 'complete clean-out' of what many names perceive to be the Lloyd's can of worms. Names expect us to find and recover the almost mythical 'pots of gold' which agents are thought to have salted away abroad. All this is frankly a terrifying prospect and we must be careful not to raise impractical expectations of a wide ranging investigation.'
> (GWR01/IC3, 1993)

This was not the only issue which bore upon the decision to investigate. Civil plaintiffs had become aware that an investigation would delay civil proceedings. The SFO were concerned that this would make civil litigants reluctant to co-operate with an SFO investigation, especially when they realised that 'any provable fraud on part of Gooda Walker directors may invalidate the E & O insurance which could be expected to provide most of the funds to satisfy civil claims' (GWR01/IC3, 1993). In addition, the SFO was beginning to acknowledge that an investigation would neither benefit the Office or the Lloyd's market. In the first instance, Lloyd's commitment to an investigation had appeared to lessen, having expressed concern that a wide-ranging and publicised investigation would probably force witnesses in its own investigations to 'become less co-operative' (GWR01/IC3, 1993). Lloyd's shift in position had anticipated events elsewhere which reduced the need for a

criminal prosecution. Lloyd's names were soon to vote decisively in favour of the planned introduction of corporate capital. It also coincided with a realisation that the necessary amount of corporate capital would join the market - banks, securities and brokers houses were queuing up to establish investment trusts to invest in Lloyd's. As Paul Archard of the Murray Lawrence agency later revealed in a *Financial Times* article on 22nd October 1993: 'There is now a large excess of supply of capital over demand' (Archard cited in Lapper, 1993a). This, according to Ken Carter, the chief executive of broker Lloyds Thompson, had the effect of boosting the confidence of names and slowing down the rate of resignations from the market (cited in Scott, 1993). Moreover, an increase in average commitments by individual names reflected in part the relaxation of solvency requirements and helped offset a decline in the number of names from 19,537 in 1993 to 18,022 in 1994 (Lapper, 1994a). Lloyd's therefore had sufficient capital to continue trading.

As Lloyd's seemed to become less committed to an SFO investigation, the SFO began to realise that an investigation would not only serve to alienate Lloyd's even further, but also damage Lloyd's reputation. Tricia Howse noted, for instance, that: 'An in-depth SFO investigation may well highlight failures in Lloyd's self-regulatory controls' (GWR01/IC3, 1993). More significant however, was the danger that a criminal investigation would uncover the suspected commission of offences beyond Gooda Walker. As Howse observed: 'We cannot exclude the possibility that, as with so many other SFO cases, we will start looking at one apparently discrete area and end somewhere quite different' (GWR01/IC3, 1993).

These issues were crucial to the decision to investigate. On the day the case was formally accepted for investigation a meeting between the Director and the Gooda Walker case team was convened. The Director expressed the view that 'the SFO [had] a responsibility not only to prosecute but to investigate cases which appear[ed] to indicate criminal activities'. He considered that it would be 'irresponsible at a vetting stage of a case to make a strategic decision not to undertake an investigation because it was thought unlikely to result in a prosecution, successful or otherwise.' The purpose of an investigation, he added, was to 'discover what criminal conduct had occurred' and that this was 'not a case where at the vetting stage criminal conduct could be ruled out altogether' (GWR01/VN3, 1993). However, the Director recognised the issues which Howse had identified as being relevant to the SFO's and Lloyd's reputation in accepting a case for investigation. He therefore

stressed that the investigation should concentrate on the false accounting relating to the commutation of four policies and the deception of the auditors and that 'any announcement of an investigation should state its limitation' (GWR01/VN3, 1993).

These limitations on the investigation proved to be decisive in bringing the investigation to close. The SFO's commitment to the investigation was questionable. A 'short, sharp investigation' had been proposed but the evidence relating to the commutations, which had been 'the most self contained area for investigation', had from the outset been recognised as equivocal. There was doubt whether the policies were 'false in a material particular' and therefore would support a charge of false accounting under section 17 of the Theft Act 1968 (GWR01/IC3, 1993). Other leads had not been subjected to sustained investigation. Significantly, no counsel were instructed (GWR01/VN3, 1993).

On 17th March 1994, the SFO was already preparing to discontinue its investigation into Gooda Walker, having concluded that 'the subject of the commutations would be more appropriate for disciplinary than criminal proceedings' (GWR01/FN1, 1994). Thus, there was no admission of insufficient evidence to proceed with a criminal prosecution nor was it the case that the impending disciplinary charges against Derek Walker failed to approximate with any substantive criminal offences. To this effect, Walker was proceeded against for having misled Gooda Walker's auditors, and for having fail to disclose commutations and replacement arrangements in his underwriters report for syndicate 290 and for signing off the underwriting balance sheet for 1990 and adopting Note 4 to the syndicate accounts which were thus false, misleading or deceptive in a material particular (GWR01/FN1, 1994).

The limited scope of the investigation had proved a success. The SFO were able to undertake an investigation without unduly undermining Lloyd's reputation but still demonstrate that it had acted in response to a legitimate request for investigation. The terms of the investigation and the SFO's caution throughout meant when the investigation was finally terminated, but the criticism it received in the news media was mild in comparison to what had been originally feared. Although, in addition to granting the chair of the Gooda Walker Action Group[16] the opportunity to claim that there had been a 'cover up at Gooda Walker' (Jack, 1994), the decision did, in some instances, provide a platform upon which the SFO's past failures could be rehearsed (Springett, 1994), there was no immediate

criticism of the SFO, only that the decision 'may lead to further criticism of the SFO' (Springett, 1994).

DEFEATED BY THE PROCESS: THE ROGER LEVITT CASE

The case against Roger Levitt and his co-defendants, Mark Reed, Robert Price and Alan McNamara, became something of a *cause célèbre* for the SFO, albeit for reasons which differ greatly from the focus of the following discussion. The news media's interest in the Levitt case centred on the suspicion that the SFO had accepted a plea from Levitt in return for his receiving a non-custodial sentence of 180 hours community service. This, using the general tenor of the comment and reporting in the news media and the reaction in the House of Commons as an index, was widely considered as wholly unacceptable. An editorial in *The Financial Times*, for example described the outcome as 'unpalatable', reflecting *The Sun's* admission of being 'aghast' at Levitt's sentence (*The Financial Times*, 1993; *The Sun*, 1993).

The reaction was in part a result of the scale of the case the defendants had originally faced, in part a result of the scale of the losses which the Levitt Group (Holdings) PLC), the company Levitt had established in 1977, and its clients had suffered (see, for example, *The Financial Times*, 1993), and in part, perhaps, due to the fact that Levitt was Jewish (see, for example, *Abrahams*, 1993; *Tory*, 1993). To the first effect, the defendants had originally been arraigned on an indictment containing twenty one counts,[17] alleging a number of offences carrying long prison sentences (LEV01/TT, 23/2/93). These included fraudulent trading, forgery, false accounting and obtaining property by deception, and at one time were estimated to have involved a sum of £58 million (LEV01/CT, 1994). On the face of it, the case against them, and Levitt in particular, seemed serious. When the Levitt Group (Holdings) PLC collapsed in 1990 it left huge debts, estimated at £34 million (Mason and Rice, 1993), and a number of clients facing substantial losses (well in excess of £3 million) on their investments with its major subsidiary the Levitt Group Ltd. (Cohen and Smith, 1993; LEV01/CS1, 1993). Although the substantially amended version of the fraudulent trading count upon which the prosecution eventually opened its case did not capture these losses in their entirety, it did capture their essence (LEV01/TT, 11/11/93; see below), but the prosecution was never able to complete its case. Instead, the SFO decided to accept a plea to deceiving FIMBRA with intend to defraud; a limited particular of the amended fraudulent trading count (LEV01/TT, 23/11/93).

None of the principal figures escaped criticism for the outcome. Levitt was villified for escaping justice (Pillenger, 1993), the trial judge for aiding and abetting him, and the justice system as a whole for dispensing one type of justice to the rich and another to the poor (*The Financial Times*, 1993). The criticism of the SFO was varied. It was severally accused of mismanaging its case, allowing itself to be outmanoeuvred by the defence and of a generally incompetent approach to the prosecution. The major focus of the criticism, however, concentrated on the extent of its complicity in orchestrating the outcome; whether, in other words, it had actively canvassed a plea from Levitt and then accepted the plea, knowing that the trial judge, Mr Justice Laws, would award him a non-custodial sentence.

The SFO's acceptance of Levitt's plea is significant in itself, illustrating the powerful bargaining position of defendants in serious and complex fraud trials (see below). Of equal significance, however, is the sequence of events which led up to the plea which forced the SFO into soliciting and then accepting it. A strategy that was embarked upon even though some members of the case team were aware that Levitt would only plead guilty on the judge's assurance that he would not go to prison. The significance of this turn events is that it originated directly from the Court of Appeal's judgement in the Blue Arrow case (*R v Jonathan Cohen and others*, 1992). The case, as we saw in the last chapter, inspired a policy initiative to limit the most radical dimension of criminal justice expansionism but, as we shall see in the following discussion, it also had a more direct effect on the prosecution of commercial fraud, since it was Laws's interpretation and application of the judgement which ultimately forced the SFO to accept Levitt's plea. In short, it created a far more hostile legal environment, restricting the realisation of criminal justice intervention.

The following discussion primarily aims to explain the effect of the Blue Arrow case and the Court of Appeal's judgement on the Levitt case, but it also examines the circumstances of the plea and its significance to the ability of businessmen to neutralise the impact of criminal justice intervention.

The Prosecution's Case: The First Indictment

The case against the defendants emerged from the collapse of the Levitt Group (Holding) PLC (TLG); a financial services holding company which principally operated through six subsidiaries

and offered a range of services relating to asset management and administration of UK offshore investments, life assurance, tax planning, pension investment, mortgages and insurance. Levitt had established the business in 1977 (LEV01/TT, 26/11/93) and, according to the prosecution, remained in effective control of the company throughout its existence. At the time of the matters which formed the subject of prosecution, Levitt was still the chair of the company, Mark Reed its managing director, Robert Price its finance director and Alan McNamara its commercial director. The four defendants were also registered as the directors[18] of the Levitt Group Ltd. (TLG Ltd.), TLG's principal subsidiary, which concentrated on asset management and the administration of UK and offshore investments and constituted by far the most important source of revenue among the six subsidiaries companies) and, until 18 July 1988 when TLG purchased its entire issued share capital (whereupon TLG Ltd. became a wholly owned subsidiary of TLG), collectively owned the majority of its shares.

After an uneventful but steady start, the business expanded rapidly and soon began to thrive. The rate of its profits growth during the mid-1980s was particularly striking. Pre-tax profits reported by the principal company (R.J. Levitt Pension Consultants Limited as it then was) grew from £169,000 to £523,000 between 1984 and 1985 and by 1986 had exceeded £1 million: an average year-on-year growth of just under 300 *per cent*. Although profit before taxation for 1987 fell to £606,069, another period of dramatic expansion (during which the Group was restructured) ensued, producing pre-tax profits for 1988 on TLG's ordinary activities of £7,989,000. The spectacular increase in TLG's reported profits had a profound effect on the value of its share price. In October 1988, London International Traders Holdings PLC (LIT) purchased 24.5% of the issued share capital in TLG for £11m from Levitt and other shareholders including Reed and Price. When LIT bought an additional stake of 8.83% in February 1989 for £4.25m, the effect was to place a capital value of £50m on the company (LEV01/CS1, 1993).

Although both the holding company and TLG Ltd. appeared to be financially sound when LIT had purchased its second major tranche of TLG shares in February 1989, according to the Crown the two companies were 'teetering on the brink of a financial precipice' (LEV01/CS1, 1993). The income generated by TLG Ltd., having been in gradual decline for a number of years, had begun to fall sharply from 1989 onwards; causing a marked deterioration in the company's financial position. The effect of this was reflected in the balance of its accounts with its two principal bankers, Barclays and the Midland. Thus, between 31 March 1989 and 30 June 1989 the amount by which TLG Ltd. had exceeded its overdraft limits rose steeply from £103,000 to

£512,000: an increase of just under £400,000 in only three months. The underlying financial position of the company was, however, even more critical than the balance of its bank accounts suggested, since in the preceding three years (from June 1986 to March 1989), TLG Ltd. had paid approximately £3m of investors funds, including those of the novelist, Frederick Forsyth, into its office account to discharge debts and other liabilities that it had incurred in the course of trading, rather than invest them in accordance with the expressed instructions of its clients.

The essence of the prosecution's case, as realised in the indictment upon which the defendants were arraigned, was that the misappropriation of client funds was just one element of a systematic and fraudulent operation to ensure that TLG Ltd. (and TLG) was able to continue trading despite the fact that it was insolvent. According to the prosecution this operation involved the pursuit of two broad objectives. The first was to conceal the true financial position of TLG Ltd. (and TLG) from its investors, bankers, accountants and its regulatory authority, FIMBRA, since, if the truth were to emerge, they would almost certainly have taken immediate action to stop the companies from trading. The second was to find funds - crucial to financing the day-to-day operation of the Group - to inject into the companies. According to the prosecution, the defendants employed a number of fraudulent techniques to realise these objectives which were undertaken with the intention of defrauding the company's creditors (LEV01/CS1, 1993).

This general course of conduct - the full panorama of the criminal actions for which the defendants initially stood accused - constituted the first count of the indictment; an offence of fraudulent trading contrary to section 458 of the Companies Act 1985. The remaining twenty one counts involved individual substantive offences which, according to the Crown, exemplified the course of conduct framed in count one.[19] The following account sets out a summary of what the prosecution claimed were the major elements of count 1 with a brief commentary on the substance of some of the substantive counts that corresponded to them.

The first three particulars of count 1 (which corresponded to the counts 2-6 on the indictment and also counts 18-22) concerned the misappropriation of investors funds. To this effect, the prosecution claimed that the defendants had directed investors' funds into the Levitt Group Ltd.'s office accounts for the purpose of discharging its debts and other liabilities, rather than into managed investment funds and bonds as the investors had instructed. To conceal the true destination of the money the prosecution alleged that the defendants had directed the production of false and misleading investment valuation reports of investor's funds which were then

despatched to investors to show that their funds had been invested in managed investment funds and bonds and that the value of the investments were higher than their true value (LEV01/CS1, 1993).

Take count 2 as an example, which alleged that Levitt had dishonestly obtained a cheque from Stephen Arnold for the sum of £230,000 by deception by falsely representing that the proceeds of the cheque would be invested in investment bonds for his benefit.

Towards the end of 1986 Alan McNamara and Alan Johnson set up the Levitt Group Investment Department, which was to form part of TLG Ltd. Johnson, who became the Investment Director, a position which gave him immediate control of the department's operation, reported directly to McNamara, the Managing Director of TLG Ltd. (as well as Group Commercial Director). McNamara and Johnson, in turn, reported to Levitt and Reed, who collectively retained overall control of the operation of TLG Ltd. from the time the Investment Department was set up to the collapse of TLG in December 1990. According to Johnson's evidence there was no doubt that Levitt was the 'controlling ship' (LEV01/CS1, 1993).

Among TLG Ltd.'s clients, there were a group of investors, who appeared on two lists known as 'Dibble List 1' and 'Dibble List 2'. The lists had been compiled by Alan Johnson and, according to the prosecution, were designed to signify that TLG Ltd had either failed to invest a client's funds with insurance companies as it was meant to or, if the client's funds had been properly invested, that the client was being sent investment valuations which were in excess of the true value of the investment held with the insurance companies (counts 2 to 6 all involved involved offences concerning the misappropriation of clients' funds who had appeared on the Dibble Lists).

During the summer of 1987, Levitt suggested to Stephen Arnold that he take out a loan secured against his home and invest the proceeds in investment bonds held with insurance companies. Levitt promised Arnold a return of between 15 and 20 *per cent* a year on his investment and assured him that the risks to his investment were minimal. On the basis of this discussion, Arnold took out a mortgage with Boston Safe Deposit and Trust Company (UK) Ltd., receiving an advance on the transaction of £230,000. This he paid to TLG, believing that it would be used to purchase investment bonds with a number of established insurance companies such as Devonshire Life and Scottish Equitable. He had no reason to think otherwise. It was not only

precisely what Levitt, who Arnold believed was personally supervising his investments, had told him, it was also precisely what the proposal forms that he had signed when originally making his investment had indicated would happen. His investment was, in fact, never invested in bonds. The cheque was simply absorbed into a TLG (number two) client account held at the Knightsbridge branch of Barclays Bank. Despite this, Arnold regularly received statements from TLG showing the value of the investments which he continued to believe had been made on his behalf. These statements had been prepared by Alan Johnson - who, according to the prosecution, was acting under Levitt's instructions - and although the percentage growth figure which they contained appeared to show that Arnold's investments were growing steadily, the figure was a concoction which was calculated to show that Arnold's fictitious investment was performing above the average market trend.

The prosecution contended that the above facts raised an irresistible inference that Levitt was fully aware of how the Investment Department was being run, including the fact that the money of those investors who appeared on the 'Dibble' lists (of which Arnold was one) had not been invested in accordance with their instructions. This, it claimed, was not only supported by the fact that Alan Johnson had discussed specific clients named on the 'Dibble' lists with both Levitt and Reed, but also by the fact that Johnson had shown them client files containing signed proposal forms which had not been sent to the insurance companies, and that Arnold's client file contained signed but incomplete proposal forms for the designated insurance companies. It was inconceivable, the Crown contended, that the above could have taken place and that, after regular meetings with Levitt between 1987 and 1990, Arnold could have been left with the impression that Levitt was personally supervising his investments, had not Levitt been aware of the true position of those investments.

The defendants encountered a serious problem whenever a client whose investment had been misappropriated sought either full or partial repayment of his or her investment: not only was it essential to cover the payment, but it was also necessary to disguise the fact that no investment had been made in the company's books. The defendant's response to the problem was the subject of the fourth particular. According to the prosecution, the defendants resolved the problem by first transferring funds into TLG Ltd.'s office bank account to cover repayment of the money and then, to disguise the true source of the money paid into the account, by making false entries in the company's books which showed that the money had been received from insurance companies for the purposes of repayment to investors. No such sum, of course, had been received.

Since TLG Ltd.'s revenue was failing it was crucial that funds were found elsewhere to keep the company trading. The fifth particular alleged that Levitt and, on one occasion Price, had made a series of false and misleading representations to financial institutions with a view to conveying the impression that TLG or TLG Ltd. were in a strong financial position and operating profitability with a view to obtaining funds. So, for example, on 15th September 1989, Levitt told Ian Tyrell of Barclays Bank that Legal and General had expressed a wish to purchase a further 7 *per cent* of TLG shares for £10 million. This was untrue. Although Legal and General had an option to purchase an additional 1.9 *per cent* shareholding, which it exercised in November 1989, there was never any suggestion that it would purchase a further 7 *per cent*. Moreover, on 16th July 1990, Levitt told representatives of Commercial Union that TLG America would make 100 million. This, again, was simply untrue. TLG America was a cost centre and not a profit centre and there was no prospect of this sort of money being made in the foreseeable future. On the same day Levitt said that Cofimor, a bank in Cyprus, was worth $10 million to TLG. This, according to the prosecution, was not true. Cofimor was dormant and not a profit centre. Another example concerning Commercial Union PLC was exemplified in count 11. James McClurg, the UK Divisional Director of Commercial Union had been introduced to Levitt socially on 17th June 1990. A meeting was arranged for 2nd July 1990, attended by Levitt and representatives of Commercial Union, to discuss business opportunities between TLG and Commercial Union. Following the meeting Levitt wrote to McClurg informing him that: TLG Sports Division had signed a £2 million contract with the ITV television network; contracts with the Post Office and Premier Consolidated Oilfields PLC would give TLG an extra £5 million earnings for the year; and that Levitt Insurance Brokers had won new business from London Weekend Television allowing them to handle all of L.W.T.'s general business. All of these statements were untrue in some respect; the Sports Division had never made any significant money, agreements with the Post Office and Premier Consolidated Oilfields PLC would not, on any measure, generate earnings on the scale stated, and Levitt Insurance Brokers arrangement with L.W.T. only extended to its senior staff.

The selection of explicit false representations cited above were not the only method that the defendants used to obtain funds from financial institutions during the 1990s. The sixth particular alleged that they also brought into existence a number of false and misleading management accounts, profit forecasts and other financial documents which were then distributed to financial institutions with a view to realising the acquisition of funds which were vital to keep the company

from becoming formally insolvent. The documents, the prosecution alleged, also served the more general purpose of concealing TLG's and TLG Ltd.'s true financial position; thereby satisfying the whole range of individuals and institutions that dealt with TLG that it was not only solvent but profitable.

The prosecution also alleged that Levitt, Reed and Price were all involved in organising the injection of funds into TLG Ltd. from Levitt's private bank accounts to keep the company trading. Without them the company would have ceased trading some months before it finally collapsed on 10th December 1990. The amounts involved were substantial. Between 1st April 1989 and 8th December 1990, a total of £19.4 million was paid into TLG Ltd.'s office at Barclays account from Levitt and his wife's private account also at Barclays. The prosecution claimed to be able to show that the defendants Reed, Price and Levitt had all been involved in authorising the payments. Moreover, over the same period, a further £1.15 million was transferred in a series of payments from the Levitts' private account at the Midland to the Barclays office account, all of which were authorised by Levitt. This was in addition to the transferral of £1,475,640 in five separate payments over the same period from the Levitts' private account at Barclays to the TLG Ltd office account at The Midland[20] and the transferral of £680,000 from the Levitt's private account at The Midland to TLG Ltd.'s account at The Midland in two separate payments.

It was the prosecution's case that the funds had been obtained from a variety of financial institutions by deception (included in the substantive counts 12 to 16). According to the prosecution, Levitt would approach the institution, requesting a substantial personal loan. The reason he would give for requiring the loan would be false. Moreover, he would give the bank a false picture of his personal assets and liabilities in the form of a net worth statement and also a false picture of the profitability of TLG and TLG Ltd. He would then represent that repayment of the loan would be made from the proceeds of sales of his shares holding in TLG, but misrepresent the level of his expected future income from TLG shares; either by saying that agreements had been reached to sell shares which had already been completed or by representing that institutions were willing to buy TLG shares when they were not. In addition to this, Levitt would make false claims about the level of future business and income for the Group, offering TLG shares as security for the loan even though some of these were already held on charge with Chase Nominees Ltd., a subsidiary of Chase Manhattan Bank. The money's obtained would then be directed into Levitt's private bank accounts, whereupon they would be drip fed into TLG Ltd.

To conceal the true origins of the funds, the prosecution alleged that a false fee note and false invoice would be created to give the impression that the sum of money represent fee income for TLG Ltd.

The eighth particular alleged that the defendants had directed the creation of false, misleading and deceptive entries in the Levitt Group Ltd sales ledger (held on a computer accounting system) which erroneously showed that fees of £20,738,321 had been received in respect of personal advisory work carried out by Levitt. These were aimed at disguising the true source of the funds which had been drip fed into the company. One of the substantive counts (20) of false accounting relating to this concerned a sum of £400,000 which the prosecution had claimed had been obtained from Frederick Forsyth by deception (the subject of count 6).This, under the requirement of the Financial Services Act 1986, should have been paid into a designated clients' bank account, but instead was paid into TLG Ltd.'s Office account at Barclays Bank and recorded in the sales ledger as fee income for consultancy work.

To further disguise the source of the drip fed funds, the defendants directed the creation of false, misleading and deceptive fee notes and invoices which erroneously represented that commission and fees had been received by Levitt in respect of his personal advisory work for clients of TLG Ltd. This was the subject of the ninth particular and corresponded to specimen counts 18 and 19 which concerned the defendants effort to conceal the origins and the use to which Forsyth's £400,000 investment had been put. To this effect, Levitt and McNamara were charged with forging an invoice and fee note to Forsyth which erroneously indicated that the £400,000 had been given to TLG Ltd. for commercial advice and negotiation on book rights for *The Negotiator*, rather than to be invested in managed investment funds.

The rules of FIMBRA, TLG's regulatory organisation, required the submission of financial information on a regular basis from its member firms so that it could be satisfied that each member company continued to comply with the solvency requirements that were a pre-condition of membership and, as such, the freedom to trade as a financial intermediary. It was paramount that Levitt, Reed and McNamara disguise the source of the funds that were injected into TLG Ltd.'s office accounts, less FIMBRA realise that this was not revenue that TLG Ltd itself had generated and that TLG Ltd was, in fact, bankrupt. As such, the funds were disguised as either commission payments or fees earned by Levitt.

This was substance of the last particular (which also corresponded to counts 21 and 22) which alleged that the defendants had directed the production of documents to officers of FIMBRA (namely a profit and loss schedule of income, schedules and a balance sheet, fee notes, invoices, letters, and minutes of a meeting of TLG's Board) which were false, misleading and deceptive in erroneously showing that TLG Ltd had received fees of £20,738,321 for personal advisory work carried out by Levitt.

The false fee notes were supplied to FIMBRA during the course of a routine compliance visit which took place between 8th and 16th October 1990. All were on unheaded paper and did not include any provision for VAT. Terence Thurley, a FIMBRA compliance officer, was given the documents to support the profit and loss account statement for TLG Ltd. which showed a net profit for the eighteen months of £15.9 million and income of £34.957 million, £21.29 million of which was recorded as fees. FIMBRA was also supplied with a copy of a memorandum from Alan McNamara to Ian Pearlman on which fee notes totalling £21,328,821.42 were listed. They were also given a schedule prepared by Ian Pearlman 'TLG Schedule of Fees Received by R.J. Levitt for the period 1 January 1989 to 30 June 1990'. The memorandum and the schedule did not agree. Moreover, TLG Ltd. was a FIMBRA category B3 member for whom the main source of income should have been life, pensions and unit trust business rather than fee income. The FIMBRA compliance team were generally concerned by the apparent level of fee income and communicated this to Mark Reed and Ian Pearlman. In addition, Terence Thurley of FIMBRA requested Martin Peasgood to provide him with supporting documentation for the fee notes.

Martin Peasgood had no knowledge of the fee income and made enquiries with Pearlman, Colin Myers and McNamara. McNamara told Peasgood that client files for these fee notes existed in Roger Levitt's office and such client files as did exist were made available to the FIMBRA compliance officers in Roger Levitt's office. Both FIMBRA and Peasgood found the contents of the client files to be inadequate.

Stoy Hayward, meanwhile, had commenced an audit of TLG on 6th August 1990. The point of contact for the Stoy Hayward team was Reed. It was agreed that all audit queries were to be submitted to either Reed or Pearlman (the Crown suggest that this demonstrated the level of overall knowledge and control exercised by Reed over the finances of TLG and TLG Ltd.). During the FIMBRA compliance visit, the Stoy Hayward audit team were supplied with

information detailing the income of TLG Ltd. for the 18 months to 30 June 1990. This information was supplied on 11th October 1990 which was the first time it had been made available to the audit team. The information showed that TLG Ltd had made a substantial loss for the eighteen month period. At a meeting on 11th October 1990, Reed assured the auditors that there was further substantial income for TLG Ltd. which was not yet reflected in the accounts. He suggested that this income totalled about £35 million - £25 million from fee income and £10 million from commission.

On 16th October at a meeting attended by Levitt, Reed, McNamara and Pearlman, Simon Ainley of Stoy Hayward was given a file containing fee notes which Levitt told him related to consultancy work which he had done personally on behalf of the company. The file also contained invoices, invoice request forms, a schedule of cash movements through Levitt's personal bank accounts and a schedule of cash received into TLG Ltd.'s bank accounts amounting to approximately £21 million. McNamara supplied the auditors with schedules of clients including commissions anticipated, commissions received and the date of receipt. He was asked for client files in support but went on holiday before any were provided. The schedule produced by McNamara was discussed with Reed who said that it contained inaccuracies as it had been compiled by McNamara from memory.

A series of meetings were held between FIMBRA representatives and Levitt to discuss the fee notes. The first of the meetings took place on 16th October 1990 in which Levitt explained that he had taken a decision to operate outside the usual system for raising invoices after having become concerned with the performance of Price and the TLG accounts department. He added that he would ask people to pay him personally for his consultancy work (as shown on the fee notes) to circumvent the normal accounting procedures which would then be drip fed into TLG Ltd. as and when it was required. The fee notes, he said, reflected business undertaken by himself on behalf of TLG Ltd and that the apparent large injection of money into TLG Ltd. at the end of the 18 month accounting period was merely a result of poor communication with the TLG accounts department.

On 18th October 1990, FIMBRA were informed that Levitt had appointed Stoy Hayward to run the TLG accounts department. On 18th October 1990, another meeting - attended by Levitt, representatives of FIMBRA and accountants from Stoy Hayward - was called to discuss the fee notes. Levitt explained that the board had given him authorisation to pay all the money he had

received for personal services undertaken on behalf of TLG Ltd. into his personal bank accounts so that it could held there until required by TLG Ltd. He claimed that the reason for this was because of a loss of confidence in Robert Price. Stoy Hayward then embarked on an exercise to verify the false fee notes and invoices. To this end the fee notes were discussed in two five hour meetings between Levitt and Simon Ainley on 23rd and 25th October 1990. Roger Levitt gave Ainley a blue wallet file containing information on each deal. A meeting was scheduled for 6th November 1990 with Levitt to finalise the circulation of clients named on the fee notes and invoices for verification purposes. The meeting was cancelled by Levitt who, it was suggested, did not want verification to take place.

FIMBRA, meanwhile, received a copy of a minute of the 8th November 1989 board meeting (signed by Levitt and McNamara), which was designed to confirm that approval had been obtained for Levitt to hold TLG's funds in his private accounts some days after the 18th October 1990 meeting. The minute represented that funds earned by Levitt on behalf of TLG Ltd. would be paid into his personal bank account and then drip fed into the TLG Ltd. bank accounts as required. The true origins of the minute were, however, soon revealed. At a meeting on 12th November, attended by Levitt and representatives of FIMBRA and Stoy Hayward, Levitt finally admitted that everything he had said about the fee notes had been false. TLG Ltd., he explained, had been short of money and he had injected his own personal funds into the company to keep it afloat; using the false fee notes to conceal this. Levitt also admitted that the board minute which had ostensibly authorised his conduct was false; and offered to resign from FIMBRA membership and to give up control of TLG Ltd.

FIMBRA gave TLG Ltd. the opportunity of constructing a new board in an effort to allow the company to continue trading. Stoy Hayward had earlier (9th November) submitted a draft proforma unaudited financial resources statement to FIMBRA. This showed a capital surplus of £8.98 million but it included a notional adjustment treating the £21.33 million drip fed into TLG Ltd. as though it was share capital as at 30 June 1990. Without the inclusion of the drip fed money, the draft statement showed an adjusted capital deficit of £12.35 million. FIMBRA soon realised that TLG Ltd. would not be able to meet the solvency requirements necessary to for one of its member companies to continue trading. Accordingly it issued a Rule 17 letter, dated 7th December 1990 and coinciding with the appointment of a receiver to TLG Ltd., privately suspending TLG Ltd. This was followed with the issue of a 'with publicity rule 17 letter' on 12th December.

Stoy Hayward did not complete the work required to produce the full audited accounts, however, a draft unaudited net worth as of 30 June 1990 was produced which showed a negative net worth of £16,252,000; reflecting TLG's own accounting records which showed that for the 18 month accounting period to 30 June 1990, TLG had made a loss before tax of £13,349,000 (LEV01/CS1, 1993).

The Indictment After the Ruling to Sever on 25th February 1993

The trial judge, Laws, anxious about 'the economy of time and the avoidance of Blue Arrow injustice', had been committed from the outset to ensuring that the prosecution narrowed its case (LEV01/TT, 25/2/93). The significance of the Court of Appeal's judgment in the Blue Arrow case was of central importance to the events that followed. It had impressed itself greatly on Laws who declared that it was 'of considerable importance for all the issues now before me' (LEV01/TT, 25/2/93) and, its interpretation, was to drastically restrain how the prosecution was able to present its case.

The judgement itself had stressed the need to have regard 'to the limitations of jury trial' and, in particular, for the prosecution to exercise 'restraint' in the 'adduction of evidence in regard to a necessary particular so that only essential evidence is produced and inessential but relevant evidence is not' (*Jonathan Cohen and others*, 1992). Its recommendations, as with the restraints on the prosecution that it was to realise, were almost exclusively directed towards complex fraud cases. As Laws observed, the judgement addressed:

> 'the undoubted fact that the ordinary rules which govern the adversarial conduct of criminal proceedings on indictment involving, as they do, a great deal of laissez faire by the judge are by no means perfectly suited and need to be adapted to the conduct of complex fraud cases of which the present is certainly an example.' (LEV01/TT, 25/2/93)

Its effect was, in Laws's view, to require the trial judge to decide not only whether the charges accurately represented 'the defendants' alleged criminality' during the preparatory hearings, but also whether the trial's length and complexity would 'inhibit justice'; leaving the way open for serious fraud trials 'to be limited so as to exclude what would otherwise be a perfectly legitimate part of the prosecution case' (LEV01/TT, 25/2/93).

The prosecution's initial response to Laws's overtures to reduce its case was resistance. Although Cocks conceded to proceeding on the first count alone, he insisted that since the prosecution's case was so deeply inter-related that only minor amendments to that count could be made, lest the case be distorted through too dramatic a reduction in the evidence. To this effect, Cocks made an application to delete the ten particulars in the count as it originally stood and substitute them with four allegations: namely, fraudulent dealing with investor's funds, fraudulently producing and disseminating false financial information, injecting funds obtained fraudulently and fraudulently misleading FIMBRA (LEV01/TT, 23/2/93). As Laws later pointed out, Cocks had made it clear that, save in relation to the substance of count seventeen (which was abandoned) the proposal 'would not alter the nature of the case in the least' (LEV01/TT, 25/2/93). This, he concluded, meant that, even in its amended form, a trial on count 1, in allowing the Crown to prove 'the whole panorama of its case', would still leave in place the 'serious risk of the sort of injustice against which Blue Arrow offers emphatic warning' (LEV01/TT, 25/2/93). As a consequence, Laws adjourned the application to amend the indictment, to allow Cocks time to consider how he might produce a real reduction in the substantive scope of count one, rather than the superficial reduction in its particulars that he had originally proposed.

Cocks' second response was far more radical, proposing an amended count one divided into three parts. The first concerned the fraudulent production and distribution of false accounts. To this effect the prosecution alleged that the defendants had directed the creation and distribution of financial information (including management accounts, profit forecasts and other documentation concerning TLG Ltd. and its holding company) which were misleading, false and deceptive. The second concerned the fraudulent injection of funds into the company. This alleged that the defendants had directed the injection of funds into the TLG Ltd. and then, to conceal their true origins, directed the creation of false, misleading and deceptive entries in the Levitt Group accounts which erroneously showed that fees of £20,738,321 had been received in respect of personal advisory work carried out by Levitt. It also alleged that the defendants had directed the creation of misleading, false and deceptive fee notes and invoices which purported to represent commission and fees received by Roger Levitt in respect of his personal advisory work for clients of TLG Ltd. The third concerned the fraudulent misleading of FIMBRA. To this effect the prosecution alleged that the defendants had directed the production of a profit and loss schedule of income, schedules and a balance sheet, fee notes, invoices, letters and minutes of a meeting of TLG's Board to FIMBRA officers which were false, misleading and deceptive in that they

purported to show that fees of £20,738,321 had been received by TLG Ltd. as a result of personal advisory work carried out by Levitt (LEV01, 25/2/93).

The prosecution's proposal, in effect, was first to sever the substance of counts two to five (which concerned the misappropriation of private investors funds) from count one, leaving the count relating to Mr Forsyth, the novelist, as the only remaining part of the fraudulent trading offence dealing with misappropriation of client funds. And second to proceed on the basis of a selection of the alleged dealings with institutions, five equity purchasers, four lenders and one investor (Forsyth). The sum effect of these amendments was that out of the one hundred and seventy eight witnesses the prosecution originally intended to call, only some sixty three would now be required (LEV01, 25/2/93).

Levitt's counsel, Jonathan Goldberg, on the other hand, submitted he would not oppose leave to sever and amend the indictment as suggested by the prosecution, provided the prosecution undertook not to proceed with a fresh trial on counts two to five. However, if the prosecution refused to make such an undertaking, he argued that the case should be split into four separate trials. The prosecution had refused to commit itself to this throughout. Significantly, however, Cocks had earlier given an undertaking that, in the event of a ruling to sever the indictment, the Crown would not proceed on counts six to twenty two if the defendants were acquitted on count one; leaving the way open for the judge to return verdicts of not guilty. And that, if the defendants were convicted on count 1, the prosecution would apply for an order to have the severed counts left to lie on file (LEV01/TT, 23/2/93).

Laws, regarding Goldberg's submission as 'an attempt...to effect a bargaining position in the guise of submissions of principle', rejected the submission, finding that Cocks' application, adequately complied with the guidance set out by the Court of Appeal in *R v Cohen and others* (LEV01/TT, 23/2/93). The sum effect, as such, was that the trial would proceed on the amended count 1, with counts 6 to 22 no longer relevant and an option to proceed with another trial on counts 2 to 5, pending any abuse of process application the defence might make latter.

The Judge's Ruling on 19th May 1993

On 19th May 1993 Laws made an order requiring the prosecution to reduce the scope of the evidence to be adduced in support of the count of fraudulent trading. The order was based upon

his finding that the prosecution evidence tending to support counts 12, 13 and 16 on the indictment, concerning the 'drip feeding' of fraudulently obtained funds into the Levitt companies, was not relevant or admissible as proof to support count one (see below). He did, however, grant the prosecution leave to appeal against the ruling, although on May 20th, Cocks surprisingly indicated that the Crown did not propose to appeal and would proceed to trial on count 1 as it now stood.

The Judge's Ruling on 9th September 1993 on the Crown's Application to Rejoin Counts 12, 13 and 16 to Count 1 on the Indictment as Amended on 19th May 1993

On the 9th September, the Crown applied to the Court for an order to rejoin counts 12, 13 and 16 (each of which were levelled against Levitt alone) on the indictment. The substance of the allegations made in the counts concerned a number of loans which Levitt had obtained from Henry Ansbacher and Co. Ltd. and American Express. According to the Crown, the proceeds of the loans had been 'drip fed' into TLG Ltd. as part of a wider strategy to 'keep the company afloat' and, as such, were an integral part of the *actus reus* of count 1 (LEV01/TT, 9/9/93). On May 19th May, Laws had found otherwise; ruling, after an application from Goldberg, that the obtaining of the loans in Levitt's own name, as opposed to the use to which they were put, was irrelevant to the fraudulent trading charge as it did not amount to 'carrying on of the business of the company' within the meaning provided by section 458 of the Companies Act 1985. This had taken the prosecution by surprise. When the original ruling to sever and the undertaking not to proceed with counts 6 to 22 had been made in February it was clear that the possibility of such an outcome had not been appreciated by either the Crown or the judge, nor was there any reason, for the prosecution at least, to believe that this would necessarily be the result. Precisely the same point had been argued by Goldberg during an earlier submission on February 23rd as part of a wider submission to split the case into four trial which Laws had rejected. Moreover, the judge's ruling on May 19th had been based on an extremely strict interpretation of fraudulent trading; an interpretation, which in view of his ruling on the prosecution's application to rejoin the counts, he had, in part it seems, been attracted to for the purpose of simplifying the case to the greatest extent possible (see below).

Despite the fact that the gradual erosion of the indictment had first begun with a series of ostensibly innocuous submissions, undertakings and rulings, its culmination in the ruling on 19th May threatened to have devastating consequences for the prosecution's case; serving to prevent

the prosecution from presenting the entire machinations of the Levitt companies to the jury. The implications of this were profound. The funds that had been drip fed into the company had been extracted from bank accounts in Levitt's (and his wife's) name and, as such, could be presented as funds belonging to Levitt himself. This would have posed immense difficulties for the Crown which, under a charge of fraudulent trading, was required to prove that Levitt had intended to defraud the creditors of TLG and TLG Ltd. What jury would find that Levitt had intended to defraud creditors if, at the time the company was insolvent, he was channelling substantial amounts of his own money into the company?

When Laws came to deliberate on the prosecution's application he declared that, in effect, it raised three issues. The first was, as Goldberg had claimed whether rejoining counts 12, 13 and 16 constituted an abuse of process, given the Crown's earlier 'unequivocal undertaking' not to proceed with them and given that 'the only change relied upon [had resulted] from a mistake of law by the Crown themselves'. The second concerned Goldberg's submission that the existence of a right of appeal against a ruling of severance (conferred by section 9(11) of the Criminal Justice Act 1987) was inconsistent with the power to revise that ruling with the effect that Laws was precluded from making an order to rejoin the otherwise severed counts. The final issue was whether he should exercise his discretion to rejoin the counts (LEV01/TT, 9/9/93).

On the first and second issues Laws found in favour of the prosecution. To the former effect, he found that Goldberg's submission of abuse of process required either impropriety on the part of the prosecution or the creation of unfairness to Levitt. Neither, he ruled, were apparent. On the second issue he found that, contrary to Goldberg's submission, the judge retained a continuing power to review an order for severance as part of his continuing duty to ensure a fair trial to both parties (LEV01/TT, 9/9/93).

The matter, as such, came down to whether or not Laws would exercise his discretion to rejoin the counts. Laws recognised that he had the power to have the counts tried together under the Indictments Act 1915 and the Indictment Rules 1971 (*McGlinchey*, 1984), but again he turned to the Court of Appeal's judgement in the Blue Arrow case. He argued that questions of severance or joinder assumed 'an importance which is not measured only by the usual considerations applicable to such issues', but rather necessarily involved a determination of 'the minimum quantity of material' a jury could 'assess if justice [was] to be done' (LEV01/TT, 9/9/93). The demands of the 'public interest', as he put it, required 'that all four defendants should be fairly,

cleanly and, as far as possible, economically tried'. Using a period of under three months as a bench-mark for the realisation of these goals, he found that rejoining the three counts would defeat all of the public interest objectives (LEV01/TT, 9/9/93).

Jonathan Goldberg's Opening on 15th November 1993

The prosecution, passing up another opportunity to seek leave to appeal against Laws ruling, resolved to proceed with the case as it stood, finally opening its case on 11th November 1993 (LEV01/TT, 11/11/93). Contrary to convention, Goldberg was permitted to open for the defence immediately after Cocks had completed his opening. His first line of argument, in view of the prosecution's lack of direct evidence against Levitt, was to stress the role of the company's employees, alleging that they, rather than Levitt himself, were responsible for what had happened and that, if Levitt was at fault all, it was because he had employed the wrong people.

Thus, Levitt was depicted as a man who was poor with numbers, incompetent and unaware of the day-to-day operation of his companies and the machinations of his staff. As Goldberg observed, Levitt could not 'read a balance sheet or set of accounts', but instead 'relied upon very highly paid and supposedly well qualified members of staff who took home salary packages of over £140,000 a year in salary and benefit, precisely because they were supposed to know how to do these things.' These highly paid employees, Goldberg added, had let Levitt down 'very badly.' Levitt might have been 'a brilliant salesman of insurance products of all kinds', but he was a 'hopeless' and incompetent manager, who 'personally lacked the necessary business education to manage his empire.' What he was not, however, was dishonest; his only failing having been his 'generosity' towards his staff and his inability to 'prevent massive culpable incompetence and perhaps also some dishonesty in the rank of his staff' (LEV01/TT, 15/11/93)

According to Goldberg, the above factors, together with the prevailing economic conditions, had served to produce the deficit in the Group when it was forced into liquidation, not Levitt's dishonesty. As Goldberg promised:

> 'You will hear evidence that this group did not collapse through dishonesty and fraud...but in truth through gross managerial incompetence exacerbated by the worse recession in the British economy which any of us have ever lived through and which was raging in 1990...'
> (LEV01/TT, 9/9/93)

The second major plank of Goldberg's address - which was aimed at crowning the theory that Levitt had not acted dishonestly - was that immediately prior to the collapse of the Group, Levitt had been channelling his own funds into the company to keep it from slipping into insolvency; a practice which surely forbade any inference of dishonesty. Goldberg described this argument as his 'best point', a 'barristers' magic wand', the 'one single point' that the jury should take with them to the jury room.

'If Roger Levitt had intended to defraud creditors of the company...he would have siphoned money out. He would never - this is an agreed fact in this case - have pumped vast sums of his own money in, all of which he lost in its collapse. If he had intended to defraud the creditors of the company...[h]e would not have continued to buy shares in his own company right to the very end of its life...If Levitt had believed his group was on the point of collapse, would he have signed every penny of his own and his wife's money into it with nothing to show at the end of the day but worthless paper shares? He lost every penny in the collapse of his company and is today an undischarged bankrupt...In the ordinary fraud case, as you know perfectly well, the man on trial has stolen large sums of money out of the coffers of his company...like the late Mr Robert Maxwell. Perhaps he bought his own yachts and aeroplane...and surrounded himself with expensive mistresses; facts which I take from the failed financier Peter Clowes from Barlow Clowes...Mr Levitt's case by extraordinary contrast is the very opposite of that...the Crown are rubbishing him, are they not? Rubbishing him because he injected about £22.5 million of his own personal money into his company in order to keep it off the rocks. Tragically, he failed...but what if he had succeeded? What if four hundred and fifty employees and their families had kept their jobs because the chairman had put his own money where his mouth was...and the company had managed to trade back into profitability a year or two later...I shall be demonstrating to you beyond argument that in the nineteen months between March 1989 and the collapse in December 1990, Mr Levitt pumped into his company about £14m of his own and his wife's money. Just imagine that, members of the jury, £14m of their own money, that is money they actually literally had in the bank available to them at the time. He pumped in a further eight and a half million, that is how you get the figure of twenty two and a half. That was money which he gave by personal loans from other banks, not concerned in this trial, to whom he hocked himself up to the eyeballs and mortgaged his house...Right to the end of the company's life, you have the clear picture of the Chairman and major shareholder pouring his personal wealth into his company and buying more of its own shares to the end, which is the direct opposite of what you would expect any fraudsman to do. If the Crown were right in the allegations of dishonesty they level against Levitt, it would mean literally he was buying more of his company's shares in December 1990...at a time when he

> must have known that they were not worth the paper they were written on' (LEV01/TT, 9/9/93).

This claim was at the heart of the events that followed, and were central to the Crown's eventual acceptance of Levitt's plea of guilt.

The Prosecution's Application to Discharge the Jury on 16th November 1993

On the 16th November, Cocks applied to the judge for a ruling to discharge the jury as the only appropriate response to Goldberg's opening speech. He claimed to have been caught by surprise. Although the attendant journalists and other defence counsel had been given a draft of Goldberg's opening, Cocks had not. He claimed that this was a 'deliberate' ploy, since Goldberg's opening was, in view of the judge's earlier decision to rule inadmissible the evidence relating to the personal share sales and their proceeds, and the evidence of the personal obtaining of the loans (May 19th), wholly misleading. He claimed that, in depicting Levitt as 'a man of good character who [had] invested his personal wealth in the company because he believed in its viability', a belief said to have been reinforced by the financial institutions interest in his company's shares, Goldberg had served to 'subvert the whole basis of the trial' (LEV01/TT, 16/11/93). This was because the claim neglected the fact that both the charges against Levitt on transfer and on the original indictment had been based upon the allegation that Levitt had raised the money by fraud. And also that the City institutions, whose investment in TLG Goldberg had described as the basis for Levitt's confidence in the Group's shares and the reason for his purchases, had themselves been persuaded to invest by fraud. As such, Cocks claimed that it was completely misleading for Goldberg to contend that the money Levitt had injected into the company was his own personal wealth or that the City institutions had invested in the company on the basis of a firm and accurate assessment of its viability. In addition to this, the tenor of Goldberg's opening undermined the agreement that had been arrived during counsels' submissions leading up to Laws ruling on May 19th to the effect that, at the appropriate time, the judge, assisted by counsel, would devise a neutral formula which would describe to the jury the origins of the money that Levitt had injected into the company. The clear intention was that the question of whether that money had or had not been honestly acquired would be excluded from the trial altogether (LEV01/TT, 16/11/93).

Cocks concluded that there was 'no alternative' open to the trial judge but to discharge the jury. This, he argued, was first necessary because if Levitt were to give evidence in accordance with Goldberg's opening, the prosecution would be forced to call evidence in rebuttal of what he had said. This, in Cocks' view, would serve to make the trial wholly unmanageable as it would involve the discussion of matters upon which the prosecution would not have opened to the jury and, as such, create another fraud trial within the main trial. Moreover, Levitt was under no obligation to testify and, as such, it was not certain that he would give evidence. If he failed to, the prosecution would not be in a position to adduce evidence to rebut the claims made by Goldberg in his opening and, as a consequence, the case would have been put to the jury on the basis of Goldberg's opening. According to Cocks: 'No modification of a final speech [could] undo that damage.' Laws, on the other hand, reassured Cocks that: 'The jury could be told, would be told, I imagine by me, that there is not the slightest evidence to support the way the case was opened all those weeks ago on the basis that he did not go into the witness-box.' Cocks, however, was unmoved, 'the damage [had been] done' (LEV01/TT, 16/11/93).

Laws's Ruling on the Prosecution's Application to Discharge the Jury on 19th November 1993

Goldberg had said that the remarks he had made in his opening indicated nothing other than the amount of money obtained and its source - precisely what the Crown had done in its opening - and, as such, the terms of his address was entirely faithful to Law's May 19th ruling. He claimed that once the sums of money had been paid to Levitt by the banks and other institutions, it became 'his money', to dispose of as he chose, irrespective of the extant allegations of dishonesty concerning how it was obtained. He claimed that he could find no other way of describing the position on his client's behalf and that he had not gone into the circumstances in which these funds were raised any more than the Crown had done.

Laws, however, stated that this 'gravely misrepresent[ed] the true effect', and what he thought 'must have been the intended effect' of Goldberg's address. In his view the jury were 'quite plainly' being told that the money Levitt was injecting into the company were either his own or his wife's money and that it had been honestly obtained (LEV01/TT, 19/11/93). This was clearly the essence of Goldberg's submission, since he was inviting the jury to accept that Levitt, as an honest man, would not conceivably have put such enormous sums of his own money, which he was free to deal as he chose, into his company if he had for a moment suspected that it was financially doomed. In short the way that Goldberg canvassed his 'best point' had encompassed

the proposition that Levitt had acted honestly in relation to the very transactions whose subject matter was excluded by the judge on May 19th and whose reintroduction he had refused.

Goldberg also argued that he had avoided any treatment of the details of the various transaction and, as such, had stuck faithfully to the understanding that the details of funds would not be discussed at the trial. This, Laws claimed, was to 'miss the point altogether; there was obviously no need to describe his client's case as to the precise circumstances in which these funds were raised in order to convey the impression that they were raised honestly. And that was precisely the impression given.' Goldberg had continuously referred to the funds that were drip fed into the company as Levitt's 'own money' and Laws stated that to say that this was no more than a neutral description of the facts which did not engage the merits of the Crown's allegations relating to how Levitt had got the money amounted to 'forensic myopia of a high order' (LEV01/TT, 19/11/93).

Goldberg had also argued that the sums raised on loan from Amex and Ansbacher 'were his own to do what he wanted with, however he had obtained them' and that Levitt beneficially owned the money. Laws, however, regarded this as disingenuous:

> 'How the fact that there was no immediate bar on Levitt's using this cash as he chose can be legitimately translated into an assertion that it was, in common parlance, his own money escapes me entirely. Of course he could have spent it on the horses...but that is a fact which says nothing about his entitlement to the enjoyment of the money; an entitlement hotly disputed by the Crown, but which was put to the jury by Mr Goldberg as an uncontentious fact' (LEV01/TT, 19/11/93).

Laws claimed that 'it was a necessary premise' of the rulings he gave in May and September that 'the rights and wrongs' of how Levitt had obtained the money he had injected into the business 'would play no part whatever in the trial in count 1'. The prosecution, he stated, would not be allowed to canvass that part of its case and nor, he claimed, could it have been 'any party's reasonable contemplation that...Levitt would assert, either through his counsel or by evidence, that in relation to all or some of those very same matters his conduct had been entirely honest.' Laws added that it had been clear throughout this would 'simply not be gone into'; a position which Goldberg himself had agreed to in the course of argument on November 16th (LEV01/TT, 16/11/93; LEV01/TT, 19/11/93).

Laws continued that, given the severance of the indictment and the rulings of May and September, it was 'surely obvious that common justice would be affronted' if Levitt was allowed to submit or testify that he had raised the funds honestly whilst the prosecution were prevented from putting forward their case on the matter. Since, Goldberg had in effect 'told the jury that Levitt acted honestly in relation to some of the very transactions as regards which he faces as yet untried accusations of fraud,' he had 'gone a very long way to subvert the clear premise' and 'acknowledged basis' of the earlier rulings that the excluded dealings should be dealt with 'entirely neutrally' (LEV01/TT, 19/11/93).

Laws's critical observations of Goldberg's opening and his *de facto* justification were, however, not sufficient to convince him that the jury should be discharged. His had to be 'a pragmatic, as well as a principled, view'. As far as Laws was concerned the 'considerable time' which would elapsed before the jury's verdict was bound to lessen the impact of Goldberg's speech, especially since he could 'direct the jury to ignore anything said by counsel which amounts to assertion not supported by evidence'. As if conscious of the weakness of the only means of reparation at his disposal, he added, 'I certainly should not assume that the jury would be unwilling or unable to comply with such a direction' (LEV01/TT, 19/11/93). Laws concluded, in other words, that the 'unfair prejudice' created by Goldberg's opening was 'not irreparable' and therefore did not require the jury to be discharged.

The Plea and Mitigation

The judge's refusal to discharge the jury, who Cocks was now convinced would acquit Levitt, placed immense pressure on the prosecution to achieve a conviction by means of guilty plea. The terms of the plea were narrow and announced to the Court on November 23rd (LEV01/TT, 23/11/93). A few days later Laws passed a sentence of 180 hours community service on Levitt and banned him from acting as a director of a company for seven years. The fact that Levitt would not receive a custodial sentence had already been determined (see below), but it still had to be justified publicly in open court to the attendant journalists.

Goldberg begun his plea of mitigation by stating the 'obvious point' which he knew to be 'foremost' in the judge's mind; namely, that Levitt had pleaded guilty. The importance of this in 'serious fraud cases' was, according to Goldberg, paramount; saving such enormous 'public time

and expense and indeed judicial time and expense' that the courts recognised that 'special credit is demanded for a guilty plea...over and above the norm' (LEV01/TT, 26/11/93). He continued by clarifying precisely how much Levitt had saved the taxpayer:

> '...one has read recently estimates of the costs of such cases as today's totalling about £100,000 a day...and thus if this trial had lasted six months, perhaps to be followed by other trials, the cost to the public would have been enormous, many, many millions of pounds.' (LEV01/TT, 26/11/93)

Laws regarded this - combined with Levitt's good character, the support in mitigation he received from 'very distinguished business men', the fact that his family had been affected and that he had lost his reputation and - as a 'substantial mitigating factor', saving 'a trial which was likely to last on counsel's estimates, three or four months' (LEV01/TT, 26/11/93).

Goldberg then set about exonerating Levitt, highlighting his talents and demonstrating how the 'factually narrow and limited' basis of his plea was a truthful reflection of his guilt. His aim, as such, was twofold: to justify the non-custodial sentence which the judge had already him Levitt would receive and to rebut the suggestion the Crown had made in its opening speech that Levitt's criminality had ranged far wider than the mere deception of FIMBRA.

Laws, maintaining the fiction that a sentence had not already been settled and seeking to obscure Goldberg's successful bargaining (see below), responded that when he passed sentence 'whatever that sentence will be', he would make it clear that Levitt and his co-defendants were 'only to be dealt with for the specific offence or part of the offence which they have admitted' (LEV01/TT, 26/11/93).

Goldberg then sought to persuade Laws, who it seemed had a poor understanding of the relevant law, that the narrow basis on which Levitt had pleaded was even narrower. The essence of his argument was that Levitt had pleaded guilty to an offence which 'came foursquare' within section 200(1) of the Financial Services Act 1986 - making false and misleading statements to a regulatory authority - which carried a maximum penalty of two years imprisonment. Thus, according to Goldberg, Levitt was in effect pleading guilty to an offence under section 200(1), although it had been framed as a charge of fraudulent trading within section 432 of the Companies Act 1985 which carried the higher maximum of sentence of seven years. This was

crucial to justifying the leniency of Levitt's sentence. Goldberg claimed that Parliament could not have intended the matters that Levitt had pleaded guilty to carry a penalty above the maximum for section 200(1), 'however it is charged', even though a charge of fraudulent trading carried a maximum penalty of seven years.

Laws, seeking to clarify Goldberg's submission so that those present in Court could grasp the implications of Levitt's plea, responded: 'The short point is that the particulars - what is it - c(v) to which he has pleaded guilty, allege facts entirely within the scope of section 200(1)' (LEV01/TT, 26/11/93). Cocks later reminded Laws that there was a crucial different between section 200(1) and fraudulent trading; namely, intent to defraud. Laws, however, was not greatly moved by the distinction.

'It is, I think, important to appreciate that the extent of these defendants' plea of guilty...could, save as Mr Cocks rightly points out, for the intent to defraud creditors, have been encompassed in a...charge...under section 200(1)...I consider that justice requires me...to have the comparison with the lesser charge...in mind in passing sentence today' (LEV01/TT, 26/11/93).

The History of the Plea

As we saw earlier, the news media's criticism of the SFO principally focused on whether the it had offered to accept a plea from Levitt, knowing that Laws would award him a non-custodial sentence. The SFO's initial response to the criticism was to deny that either it, or anyone working on its behalf, had offered a plea to Levitt. As Nicholas Lyle, the Attorney General, stated in the House of Commons (after being fully briefed by the SFO), it had simply accepted an 'offer by Roger Levitt' to plead guilty to the limited aspect of the fraudulent trading count which was 'first made on Monday 22nd November 1993 by [Levitt's] leading counsel to leading counsel for the Crown' (House of Commons, 1993a: w.col. 337); a position repeated a week later when he revealed that he had been 'assured by counsel that, although potential pleas may have been discussed on a counsel to counsel basis, no offers were made by the Crown to Mr Levitt' (House of Commons, 1993b: w.col. 1046). Similarly, the allegation that the SFO was aware that the judge would impose a non-custodial sentence when it informed the defence that it was prepared to accept Levitt's plea, was also denied (House of Commons, 1993a: w.col. 337).[21] The available evidence on both matters, however, tended to suggest otherwise.

According to Jonathan Goldberg, David Cocks had personally 'offered to accept a plea of guilty from Roger Levitt on terms only marginally less favourable than that which was finally accepted on November 22nd', long before Cocks' opening address to the jury (LEV01/C1, 1993). To this effect, Goldberg claimed, that Cocks had offered to accept the FIMBRA allegation (see below) combined with an amendment to the same count which would include Levitt admitting knowledge and participation in some of the false valuation reports sent to personal investors (see below), with all the other charges and allegations being dropped. That offer, according to Goldberg, was repeated in slightly more favourable terms to Levitt by Cocks' junior, Jonathan Fisher on November 9th, two days before the prosecution opened its case. Levitt was not prepared to agree to either of these offers, but their true significance, as Goldberg later observed, was that neither would involve Levitt pleading guilty to 'anything which actually caused financial loss in itself to anybody' (LEV01/C1, 1993).

Over a week after Cocks had begun his opening speech to the jury, an event occurred which 'triggered the eventual plea on November 22nd' (LEV01/C1, 1993). This was the suspended sentence given to Terry Ramsden for, what in Goldberg's view, was 'a plea to a more serious fraud' than the one on offer to Levitt. The result was reported prominently in the news media on November 20th and, on the following day Sasha Wass, Goldberg's junior, discussed the question of a plea again with Fisher. Wass referred to Ramsden and asked whether Cocks would accept a plea to the FIMBRA allegation only. Significantly, according to both Goldberg and Wass, she stressed that Levitt would only plead if he first received an indication of Laws that he would not receive an immediate custodial sentence. Fisher replied that there would have to be a conference in which Staple would be involved (LEV01/C1, 1993; Wass cited in Eisenhammer and Wilcock, 1995).

The following morning a meeting took place Levitt's and the SFO's counsel. The plea was discussed and Cocks left to take instructions from Staple who had come to court especially for that purpose. He returned handing Goldberg a letter stating the prosecution's agreement to accept a guilty plea from Levitt to particular 1(C)(v) of count 1 of the indictment which related to deceiving FIMBRA (LEV01/C1, 1993; LEV01/In2, 1993).

Levitt's counsel then sought an indication from Laws in his Chambers whether he would give Levitt a non-custodial sentence on the plea. According to Goldberg, Cocks 'knew full well, as did

all members of [Cocks'] team, that it was on this basis that [he] asked to see the judge' and that Cocks had agreed to accompany them for this purpose. Cocks, as such, knew that the judge had given Levitt an assurance that he would not receive a custodial before the plea was taken, although at this point, the SFO later claimed, it was too late: the prosecution's acceptance could not be retracted (Mason and Rice, 1993). This, however, contradicts Goldberg's account of what the judge had said in Chambers (which was recorded), namely that he 'would want [Cocks] to justify the course [he] had agreed to take in light of the facts of the case' (LEV01/C1, 1993). The matter for the judge, in other words, was not closed.

Some of this information later entered the public domain (see, for example Eisenhammer, 1995a; Eisenhammer and Willcock, 1995; Eisenhammer, 1995b). Moreover, contrary to Staple's persistent denial that Cocks had had no authority from the SFO to 'encourage a deal' (Staple cited in Eisenhammer, 1995c), it emerged that, as early as November 5th, Cocks had 'taken instructions from a high level' within the SFO after having made a number of 'overtures' to Levitt's defence team for him to accept a plea on favourable terms (Geoffrey Goldkorn, Levitt's solicitor, cited in Eisenhammer, 1995a).

The Plea and Class Bias

Levitt's plea to only one of the ten of the allegations he initially faced is in itself significant; illustrating the powerful bargaining position of defendants in serious and complex fraud trials. The fact that Levitt, as opposed to someone like Mayhew for instance, was able to exercise this bargaining power is of some importance to the twinned questions of whether a class bias exists in favour of 'white-collar' criminals and, if so, how that bias is realised. Since, unlike Mayhew, who was a respected City figure and whose legal costs were paid by his employers, Cazenoves, Levitt had a far less celebrated professional history and, apart from the support in mitigation he received from a number of respected businessmen, did not have the resources of an influential financial institution to support him. Yet, despite this and the fact that his prosecution, conviction and imprisonment promised to serve an array of interests, including the state's criminal justice apparatus, the financial services industry, its regulators, and the SFO, he was still able to obtain what on all accounts was a favourable deal from the SFO.[22] To understand the significance of Levitt's plea to the question of class bias, it is necessary to first appreciate the present state of the debate on the relationship between social class and white-collar crime.

The debate on social class and white-collar crime has a long and complex history. Few criminologists deny that a class bias exists. On the contrary, although some, like Croall for example, have occasionally flirted with the idea (Croall, 1989; Katz, 1980; Wheeler, *et al*, 1980), most criminologists recognise the operation of class bias (see, for example, Clinard and Yeager, 1980; Levi, 1987). In this sense, the state of criminological knowledge has changed little since Sutherland's early work which identified class bias as a central issue (Sutherland, 1983). However, on the question of how class bias is realised, the debate has moved on considerably.

The modern approach, represented in the work of Shapiro (Shapiro, 1990), has been to take issue with those (usually unidentified) criminologists who locate bias in the social standing of the white-collar offender; claiming that such analyses misunderstand the relationship between class bias and social control. Shapiro locates the source of this misunderstanding in Sutherland's original formulation of the term as a 'crime committed by a person of respectability and high social status in the course of his occupation' (Sutherland, 1949: 9). The definition, as with many of its derivatives, like organisational and occupational crime (Clinard and Quinney, 1973; Schrager and Short, 1978), as such, embraces, rather than fuses, two concepts - the characteristic of the offender and the offence. This, Shapiro and others argue, provides the basis of a whole series of fundamental problems (Shapiro, 1990; Croall, 1992). Braithwaite, for instance, observes that it conflates definition with explanation (Braithwaite, 1985: 3), but it is Shapiro, the most strident critic of the term, who develops the most systematic criticism against the 'imprisoning framework' that the concept of white-collar crime imposes on its own explanation. She argues that the 'spurious correlation' which it encapsulates, not only tends to draw attention away from the criminal acts themselves, but in doing so causes sociologists to misunderstand the 'structural impetus' for white-collar offences, the problems they create for systems of social control, and the sources and consequences of class bias in the legal system. Instead, she contends, it is the offences themselves rather than the status of the offender which accounts for class bias and where, as such, the relationship between social class and crime is to be found (Shapiro, 1990: 346-347).

Although Shapiro explicitly denies attempting to offer a 'competing conceptualization', her answer to the 'spuriousness of the white-collar crime concept' is nonetheless to create one. Because she argues that to define white-collar crime in terms of the characteristics of its perpetrators precludes 'the possibility of exploring empirically the relationship between social

class and crime', she divests the term of the social attribute of the offender and develops a definition around the one concept which she argues is common to most white-collar crimes - the violation of trust between agent and principal (Shapiro, 1990: 347). Notwithstanding, this concept's failure to encapsulate a number of established white-collar crimes, like crimes of healthy and safety for example (as Shapiro herself acknowledges, 1990: 357), Shapiro undertakes an accomplished examination of how the social organisation of trust relationships confounds the social control process, by impeding the discovery and investigation of potential crimes and complicating efforts to punish offenders.

The trust relationship, she argues, denies investigators access to the 'loci of misconduct'. There are, as Shapiro observes, a number of reasons for this. The nature of the fiduciary relationship, for instance - with its tendency to involve transactions which take place over an extensive period of time, to be 'dispersed around the globe' and to be realised within subsidiaries shell companies and exchanges - has the effect of obscuring abuses of trust and making the collation of evidence difficult for control agencies. Moreover, structural features of organisations and organisational networks - such as hierarchy, specialisation and diversification - serve at once to conceal and inhibit the flow of information to those responsible for detection and investigation. Another inhibition to the detection and investigation of the trust relationship is that it often involves principals entrusting agents to exercise discretion and to administer a process with contingent or uncertain outcomes. The effect of this is that the outcome of abuse, financial loss, is nearly as common an outcome of legitimate transactions; a coincidence which serves to obscure breaches of trust from principals and control agents. In addition to this, Shapiro draws on Katz's observation that abuses of trust tend to comprise a series of acts which are widely dispersed over time and place and which appear to be part of ordinary routines. Abuses of trust, as such, therefore tend to escape 'unambiguous expression in any specific, discrete behaviour' (Katz, 1979: 435-6 cited in Shapiro, 1990: 554), making the process of detection and investigation not only long and painstaking but intrinsically liable to fail. And finally trustees tend to have custody not only of principals' money and property, but also of the documentary evidence needed to establish a pattern of abuse (Mann, 1985). Offenders, in short, are ultimately the authors of their own incrimination and benefit from all the powers of manipulation, destruction and concealment that this brings. Thus, to summarise, not only is evidence difficult and expensive to collate, but it is also rare to find any direct evidence of abuse and, rarer still, to find any discrete evidence of abuse (Shapiro, 1990: 353-358).

Shapiro argues that these difficulties, and the attendant delay in bringing criminal proceedings, combine with a series of other factors - such as the 'difficulties in fashioning remedial sentences', the fact that criminal charges are more likely to be contested than civil or administrative ones, and the dangers of 'harsh sanctions spill[ing] over onto innocent parties' - to render the 'traditional strategies of control' ineffective in constraining those who steal through trust. And that this, in turn, serves to provoke regulators into embracing 'compliance models of social control available in civil or administrative proceedings over the more severe deterrence option of criminal prosecution' (Shapiro, 1990: 358-359).

This is not to say that Shapiro refuses to recognise that social class can serve to exercise a more direct impact on social control (independent of its expression through the medium of the trust relationship). She does, for example, acknowledge that the ability of white-collar offenders to afford better legal counsel, their greater resources to mount a successful defence, the empathy that judges and other enforcement officials show them. and the ability of offenders to make or shape the laws that regulate them - all direct functions of the social class of the white-collar offender - serve to vest the white-collar offender with relative immunity from the full power of criminal justice intervention. Nonetheless, she insists that the effect of an offender's social class on prosecution is largely 'consequential', playing a more complex role in shaping and frustrating the social control process than traditional theory has allowed (Shapiro, 1990: 358 and 362).

Shapiro's attempt to highlight the structural nature of class bias provides a valuable contribution to the debate on the relationship between social class and white-collar crime, but her emphasis on offences tends to obscure as much as it reveals. More specifically, it minimises the significance of class with the effect of divesting the relative leniency afforded to white-collar offenders of much of its political dimension. This is achieved on the basis of two premises: a narrow concept of class and an understanding of criminal justice as an ahistorical monolith.

Shapiro's conception of class is drawn exclusively from the work of Weber, serving to create an artificial distinction between the social status of a person and their social role. This enables her to discuss the source of class bias in terms of the nature of the offence and, therefore - apart from the subsidiary effects of the advantages of better legal advice for instance - to situate class bias as a by-product and not a cause of white-collar offenders' relative immunity from the full effects of criminal justice investigation and prosecution. Social status and social role are different, but not

exclusive of one another as Shapiro's argument maintains. A person's social status and, therefore their class, is as dependant on their social role within organisations and the trust relationship (the organisation of economic and cultural production in other words) as it is dependant on their wealth or education (Leys, 1996: 125-150; Milliband, 1969: 23-48). Thus, by simply shifting our theoretical framework from Weber to Marx, the position and prominence of class in how we explain class bias changes dramatically. Class becomes a function of the trust relationship, as intimately dependant on that relationship as it is on wealth, and therefore a cause rather than a consequence of class bias.

Shapiro's emphasis on the organisation of trust relationship as the primary source of class bias also rests on finding historical truths in historically specific observations. Class bias in criminal prosecution for Shapiro is an inadvertent and unavoidable consequence of trust relationships. The organisation of the trust relationship, in her view, with its inherent complexity and protection from the 'legal institutions of privacy' (Shapiro, 1990: 353), possesses a structure which is fundamentally resistant to criminal justice intervention. This conclusion is, however, only sustainable provided the structure of the criminal justice process escapes analysis as an ahistorical monolith. Since - to preserve its coherence and avoid the awkward question of why criminal justice has not been adapted to overcome its failure to significantly and effortless penetrate the trust relationship - it is forced to assume that there is something intrinsic to the criminal justice process which renders it incapable of realising the detection, investigation and prosecution of abuses of trust. It is, however, one thing to say that, as the criminal justice process stands at present, it is structured to frustrate the criminal prosecution of white-collar crime, quite another to say that there is something intrinsic to its very nature which serves to frustrate prosecution.

The structure of the criminal justice in the UK at least has never stood still. On the contrary, its history is one of change and adaptation to meet the changing requirements of the state. What is significant is that most of these changes have been, and continue to be, undertaken to meet the demand of controlling the working class (Storch 1975; Bunyan 1977; Cohen, 1981; Christian, 1983). The sum effect of these adaptations in relation to the provision of legal services and the law of evidence and procedure has been to realise a trial process which is finely tuned to secure a high turnover of convicted conventional working-class defendants (McBarnett, 1981; McConville, *et al*, 1994; Young, 1996; Goriely, 1996). Many of these reforms are, admittedly, relevant to the prosecution of commercial fraud (an aspect of abuse of trust in Shapiro's

terminology), but not as effective, it seems, in securing convictions. This is where we must recognise the specific problems posed by the organisation of trust relationships (commercial fraud). The question, however, remains. Why have these problems not been overcome? Specific adaptations to the criminal justice process aimed at controlling certain types of offences or offenders are not novel (see, for example, Hillyard, 1995; Rose-Smith, 1979). Why have the specific adaptations not been sufficiently radical to secure the routine conviction of commercial fraud offenders? Moreover, despite these recent reforms to the detection, investigation and prosecution of commercial fraud, most criminal justice reforms are still aimed at improving the detection, investigation and prosecution of conventional crime. The most recent reforms to the criminal justice process, for instance, have been aimed at making the crimes of the working-class easier to detect (see the Police Act 1997) and also at restricting defendants' ability to create spaces of resistance at trial (see the Criminal Procedure and Investigations Act 1996). It is little wonder, as such, that criminal justice is not ideally suited to the investigation and prosecution of abuses of trust or (relating the argument to the present inquiry) commercial fraud.

More importantly, however, Shapiro's argument ignores the improvements that can be made in the prosecution of abuses of trust. As the history of commercial fraud prosecution from the 1980s onwards suggests, the criminal justice process can be specifically adapted to increase the scope and penetration of criminal justice intervention - to make, in other words, trust relationships more vulnerable to detection, investigation and prosecution. The nature of commercial fraud (an aspect of the violation of trust in Shapiro's terminology) might continue to impede detection, investigation and prosecution, but this cannot be understood independently of the historical position of commercial fraud prosecution. Shapiro's answer to this is to draw on a variant of Pontell's concept of 'system capacity' (Pontell, 1982, 1984). This, however, confronts similar problems. Take Calavita and Pontell's study on the US Federal Government's response to the Savings and Loans Crisis in the late 1980s and early 1990s, for instance (Calavita and Pontell, 1995). The authors observed that despite the devotion of an unprecedented level of resources to the investigation and prosecution of 'thrift crime', the FBI, Justice Department and the courts were nonetheless overwhelmed by the scale of fraud in the Savings and Loans industry. This, they argued, was because the huge costs involved, the complex nature of the cases and the vast amount of evidence that had to be processed, served to impose limits on the capacity of the system to accommodate such a large scale of fraud. The suggestion, however, was not merely that the mechanisms of financial fraud prosecution were inadequately resourced to accommodate the demand for prosecution, but that there was a finite limit to the criminal justice system's

capacity to process thrift crime. This, however, contradicts Calavita and Pontell's earlier finding in the same essay that the number of offenders investigated, charged and convicted in relation to the Savings and Loans scandal marked an 'unprecedented attack' on financial fraud. In short, the criminal process's capacity to prosecute thrift fraud was increased and, as such, although the resources at its disposal limited its capacity that limit was not fixed.

A similar pattern is observable in the UK. Before the most recent episode of reform to commercial fraud prosecution, criminal justice was far less equipped to prosecute commercial fraud. It took a unique convergence of political, economic and ideological forces to increase its capacity to broaden the scope and increase the penetration of criminal justice intervention. The criminal process's capacity to prosecute commercial fraud (or the trust relationship's resistance to prosecution) is not fixed but politically and historically contingent. It can, in other words, develop to penetrate the depths of the trust relationship.

Shapiro's apolitical and ahistorical analysis of the criminal process serves to compound her blindness to the importance of class. Since reform to commercial fraud prosecution in the UK, for instance, was in part the result of a recognition of class bias within criminal justice, the class of the offender was central to improving the penetration of criminal justice. In other instances the class of the regulated (who they are and what they do) is integral to putting social distance between them and the state (Levi, 1987: 85-117). Moreover, within any given structure of serious fraud prosecution, prosecution involves political choices. It may well be that Laws's desire to narrow the case against Levitt was borne of cost considerations or the complexity of the case, but these are nonetheless political choices. It is instructive that no efforts were made to radically transform the nature of the case against the defendants in the first Guinness trial.

Although Levitt's ability to obtain a non-custodial sentence from a case which was generally considered to demand a sentence of custody may not have immediately derived from his high status or class, his bargaining position did. It was ultimately founded in his prior position as chair and chief executive of a relatively large organisation which made direct evidence of dishonesty difficult to uncover. This necessitated an elaborate reconstruction of events in which dishonesty could be inferred. The judge's desire to limit courts costs and ensure 'a fair and manageable' trial combined with the SFO's overriding desire to secure a conviction and avoid criticism for the expense involved in a case which might have resulted in an acquittal radically weakened its bargaining position, but it is still Levitt's prior position which is key. In addition, the Levitt trial,

as with the Mayhew case before it, also suggests that Shapiro places too great an emphasis on the trust relationship. To some extent, the strength of Levitt's position to bargain with the SFO was the result of having a team of legal advisers who were prepared to go to extraordinary lengths to ensure that Levitt did not receive a custodial sentence. This in class or status terms contrasts radically with the quality of advice on offer to legally aided working-class defendants who are generally encouraged to plead guilty, without so much regard for the prospective sentence that they will receive and even when the evidence against them would not necessarily lead to a conviction if they were to contest the charges against them (McConville, *et al*, 1993).

Of greater significance to this discussion however, was how the case developed to force the SFO into soliciting and finally accepting a plea. The turn of events in the trial originated directly from the Court of Appeal's judgement in the Blue Arrow case (*R v Jonathan Cohen and others*, 1992). Since, it was the trial judge's interpretation of this judgement which ultimately forced the SFO to accept Levitt's plea. After the financially permissive Guinness and Blue Arrow trials the expense of long trials had finally been brought to bear on the process.

THE 'MIS-SELLING' OF PENSIONS AFFAIR

The Origins of the Problem

The 'mis-selling' of pensions affair was at once a cause and consequence of the spectacular growth in personal pensions during the late 1980s which swept through the pensions industry after the introduction of the Social Security Act 1986 (SSA 1986). Occupational pension schemes, the basic state pension and the State Earnings Related Pension Scheme (SERPS) had traditionally represented the most important source of financial provision in retirement (Ogus and Wikeley, 1995: 213-214), but a decline in full-time, stable employment and the associated rise in the cost of welfare provision, prompted the Government to devise plans to shift the emphasis of pension provision onto personal pension plans. The principle instrument to this effect was the SSA 1986 which served to make personal pensions a more attractive and accessible form of investment (Ogus and Wikeley, 1995: 246-266).

Consumer organisations had initially forced the pension issue onto the agenda; highlighting how inflation eroded the 'frozen benefits' of employees who had left their occupational

pensions before the schemes' normal retirement age. The strength of the campaign resided in its ability to translate the pension issue into yet another aspect of the personal misery of unemployment, threatening to deepen the unpopularity of the state's monetarist influenced economic policy. It was this, according to Marshall Field (a partner of Bacon and Woodrow, the consulting actuaries, who was closely involved in the development of the Government's plans), that moved officials within the Department of Health and Social Security (DHSS) to consider the matter (Cohen, 1994b).

There is some irony that the 'great deal of fuss from consumerists and the press' (Field cited in Cohen, 1994b) led to SSA 1986 and the revolution in personal pensions since, despite rising unemployment, financial disadvantage to 'early leavers' was already in decline. An increasing number of pension schemes were incorporating inflation proofing and transfer mechanisms into their terms, militating the effects of financial disadvantage. Moreover, the Social Security Act 1985 had not only specifically provided for the revaluation of deferred benefits in line with inflation, but had also made it easier for employees to leave occupational pension schemes (Ogus and Wikeley, 1995: 264). As one expert on pensions observed up:

> 'It is ironic that a problem area cited as a major reason for the advent of personal pensions had, by the time of their appearance, been resolved to a considerable degree.' (Hymans, 1993, A.2.1-01)

The irony was superficial. The demand to minimise the financial disadvantage of people who left occupational pension schemes as a result of redundancy or re-employment was not the major motivation - different forces drove pensions policy. A paper produced in 1983 by the Centre for Policy Studies entitled *Personal and Portable Pensions - For All* (Centre for Policy Studies, 1983) was especially influential. It was highly critical of occupational pension schemes for discouraging mobility in penalising 'early leavers' and called for individual ownership of pension assets. The paper had a profound impact on Sir Norman Fowler, the then Secretary of State for Social Security. According to a report in the *Financial Times*, based on the recollection of former officials from the DHSS, he was 'gripped' by the idea which seemed a logical extension of individual ownership of homes and shares (Cohen, 1994b).

Fowler's enthusiasm, however, clashed with the prevailing wisdom within the DHSS. As early as 1982, senior civil servants had expressed serious misgivings about a radical expansion of personal pensions. According to *The Financial Times*, DHSS officials had warned Government Ministers 'from the outset' that in all likelihood personal pensions would be 'a bad bargain for all but a limited group of potential customers' (Cohen, 1994b). Fowler, nonetheless, pressed ahead. He established a committee to consider changes to social security legislation and set up a personal pensions sub-group which included Sir Mark Weinburg (a future chair of J. Rothschild Assurance, who went on to create two of Britain's largest life companies, Allied Dunbar and Abbey Life). The sub-group produced a report in July 1984. Although this acknowledged the danger of employees being encouraged to transfer or opt-out from occupational pension schemes into inferior personal pensions,[23] its main focus was on promoting individual choice and removing the penalties associated with leaving an occupational schemes before the normal retirement age (Cohen, 1994b).

Any prospect that the concern over employees' financial interests being subordinated to those of the life assurance industry might figure prominently in shaping the Government's plans evaporated in 1984 when the DHSS were alerted to the soaring costs of SERPS. Personal pensions seemed to offer an ideal way of cutting the costs of SERPS provided people could be encouraged through tax incentives to opt out in sufficient numbers. Marshall Field later revealed that it was at this point that the DHSS 'got the idea you could blend these two themes together'. This idea, according to one former official, 'mesmerised' the Government and Fowler's determination to see large numbers of people contract out of SERPS, it seems, blinded the Department to the dangers inherent in its plans. (Cohen, 1992b). As Jon Minchin, managing director of Pensionline (a company offering independent advice on pensions) observed: 'The government created a market and then failed to regulate it properly' (Minchin cited in Marsh, *et al*, 1994).

The plans, revealed in a Green Paper and later implemented in the SSA 1986, were disastrous. A National Audit Office study estimated that rebates offered as an incentive for people to opt out of SERPS between 1988 and 1993 would cost the National Insurance Fund £5.9 billion more than it would save in terms of lower entitlements to state pension (Ogus and Wikeley, 1995: 249). More significantly, however, it became clear that the scale of the growth in personal pensions which followed was, in large measure, due to employees transferring from occupational pension schemes on the basis of poor and misleading advice.

The Advantages and Disadvantages of Transferring from an Occupational Pensions Scheme into a Personal Pension Scheme

Pension transfers arise when an employee leaves an occupational pension scheme before the scheme's normal retirement date. This typically arises when the employee moves to a new job or is made redundant. Some schemes allow for the employee to have their contributions refunded, but where this option is not available a question arises concerning how the employee should deal with the deferred benefits remaining in the scheme. Several options are available; including leaving the 'deferred benefits' within the scheme, transferring them into a new employer's scheme, a section 32 annuity or into a personal pension plan.

To comply with the relevant regulations (see below), an adviser would need to cover a number of areas with a prospective client deciding how to deal with his or her deferred benefits. First, the employee's personal position, financial needs, and attitude to risk would have to be ascertained. Second, the adviser would have to obtain full details of the ceding scheme[24] of the client's existing pension scheme to establish what benefits would be sacrificed (such as early retirement options) if the deferred benefits were transferred. And finally, the question of whether the client was in a good position to join another occupational pension scheme would have to be considered (KPMG, 1993: 6).

A transfer into a personal pension posed several disadvantages; especially where re-employment was found soon afterwards. This was because employers seldom contributed to a personal pension and, as such, an occupational pension scheme would almost invariably represent a more financially attractive option. Furthermore, although personal pensions generally promised better provision for early retirement, this was not inevitable. Some ceding schemes made provision for early retirement, but more importantly the superiority of a personal pension was in large part dependant on the amount invested in the policy and its performance. Another potential benefit of a personal pension was its promise of providing larger benefits than a deferred pension. This again, however, was dependant on the amount of money paid into the policy, the performance of the investment fund and the cost of annuities on retirement.

The KPMG Study

The growth in personal pensions was dramatic. SIB estimated that pension transfers worth some £5.5 billion had taken place during 1991 and 1992; a figure consistent with an estimated 500,000 individual pension transfers between 1989 and 1992 (KPMG, 1993: 8). Although life offices provided most of the personal pension plans sold a range of financial intermediaries and sales forces were involved in their marketing; including the direct sales departments of life offices, bank and building society branches and independent financial advisers (KPMG, 1993: 7).

The SRO's had long been aware that 'mis-selling' had accounted for some of the rise in sales. LAUTRO, for example, had issued an enforcement bulletin in March 1990 instructing its members to modify misleading advertisements which urged people to contract out of SERPS (Cohen, 1992b). Similarly, according to a report of LAUTRO's monitoring committee (released in January 1992) complaints about transfers from occupational scheme members containing substantiated allegations of 'mis-selling' had shown an appreciable increase from June 1990 (Cohen, 1992b). At this stage there were over 4.3 million personal pension holders but, despite the potential scale of the problem, it took LAUTRO and FIMBRA until July 1992 (followed by SIB in August 1992 and IMRO in March 1993) to issue detailed guidance on pension transfers, detailing the necessary minimum to conform to the SRO's conduct of business rules[25] (KMPG, 1993: 7; Smith, 1994a). The SRO's and SIB's failure to spell out precisely what the conduct of business rules required was reflected in the enforcement of existing guidance. As LAUTRO's Chief Executive, Kit Jebens, put it:

> 'When I joined, the brief I got from the then chief executive was that the industry consisted of good guys with a great deal of integrity - all we need to do is to produce a set of rules' (Jebens cited in Smith, 1994a).

This inept approach to regulation proved catastrophic. Some sectors of the pension industry were structured to increase the risk of pensions being sold in contravention of an SRO's rules. A report in *The Financial Times* documenting the experience of a salesman with Acuma, then a subsidiary of American Express, illustrates this perfectly. Explaining the pressures his employment contract imposed upon him, he said:

> 'We described ourselves as salaried employees, but you got your salary only if you met specific sales targets. I was told I would be paid £1,000 a month, but I realised soon after starting that to earn this I had to sell around £3,000 worth of business, amounting to seven or so pensions or similar products. If you didn't meet the target, you owed the company money on the salary you had been paid but hadn't earned' (Marsh, *et al*, 1994).

'Some colleagues', he added, 'ran up large debts', with the effect that sales staff lasted an the average of about six months (Marsh, *et al*, 1994).

It was not until SIB began to send a pensions expert on inspection visits to its directly regulated firms that more systematic action was taken (KMPG, 1993: 8; Smith, 1994a). On September 14th 1993, SIB contracted accountants, KPMG Peat Marwick (KPMG), to undertake a review of a representative sample of IMRO, FIMBRA and LAUTRO's member firms which had undertaken transfer business. The scope of the study was limited to the period between January 1991 and June 1993 and pre-determined according to terms dictated by SIB. This defined the objective of the study as an evaluation of 'the extent to which investment firms had undertaken pension transfer business from occupational pension schemes in accordance with the requirement of their regulatory bodies.' The benchmark against which compliance was measured were the SRO's conduct of business rules,[26] notably the 'know your customer' requirement, the suitability rule and the requirement to put the client in a position to make an informed investment decision. The methodology of the study was equally limiting; based solely on an examination of client files (which staff from the SRO's completed themselves), neither clients nor sales personnel were interviewed. (KPMG, 1993: 11).

Notwithstanding the restricted nature of the research, the results of the study (published in December 1993) were startling; exposing wide-spread disregard of the relevant regulations. Of the 735 client files reviewed, only 9 *per cent* were judged to evidence substantial compliance with the main conduct of business rules; 54 *per cent* were designated as unsatisfactory,[27] 8 *per cent* as suspect[28] and 29 *per cent* as unsatisfactory and suspect (KPMG, 1993: 16). Once pension 'mis-selling' had been given some sense of scale, the opposition in the House of Commons and the news media were far better positioned to attack the Government, SIB and the SRO's and the life assurance industry for their respective roles in the affair. Only a matter of weeks after the Treasury and Civil Service

Committee announced its intention to investigate 'mis-selling' (Owen and Smith, 1994), for instance, Donald Dewer (then shadow social security secretary) claimed that there was 'an atmosphere of scandal' surrounding the industry (Dewer cited in Smith and Blitz, 1994).

The response of the life assurance industry and its SRO's was not to deny the existence of a problem, but rather to question its scale and to explain it, in part, in how KPMG's findings had been presented. Some SRO's, concerned about how the adverse publicity of the study had damaged the competitiveness of its member firms' - contested the validity of KPMG's findings.[29] Godfrey Jillings, the then chief executive of FIMBRA, for instance, claimed that the SRO had 'deliberately included at least one firm' in which extensive problems with its files had already been identified. This, he claimed, meant that the KPMG study had included a disproportionate number of firms where there were problems (Cohen, 1994a).[30] Some firms, concerned that SIB's action would deter people from taking out personal pensions, even went so far as to criticise the SIB's handling of the affair (Hughes, *et al*, 1993). According to a report in *The Financial Times*, many in the life industry had claimed that SIB's presentation of the KPMG study had increased the prospect of investor panic (Smith, 1994b). Scottish Widows' marketing manager, David Graham, argued that the SIB ran the risk of bringing the whole pensions industry into disrepute, adding that he would have 'preferred a lower-key tack' (Hughes, *et al*, 1993).

The SIB's intervention in the affair was not, however, the only public relations problem that the SRO's and life industry faced.

The Referral

On February 28th 1994, having read news reports of the results of the KPMG Peat Marwick inquiry, John Edmonds, the General Secretary of GMB, wrote to George Staple urging him to investigate the transfer of personal pensions which had formed the subject of the inquiry. The 'scope and enormity' of what had happened combined with the 'bad advice' which had 'failed to meet regulatory guidelines', he suggested, fell within the meaning of 'serious fraud'; especially since some of the files that KPMG hold looked at had found 'suspect advice' (GMB01/C1, 1994).

Staple's initial response was to inform Edmonds that there was neither sufficient evidence nor was the SFO designed to investigate the affair. The SFO, he observed, neither had the 'resources nor the powers to investigate the whole area of personal pension transfers' and that neither breaches of 'regulatory guidelines' nor 'bad advice' were matters which would warrant investigation by the SFO. Staple did, however, assure Edmonds that SIB treated fraud with the utmost seriousness and, if evidence of fraud emerged which warrant the SFO's consideration, it would 'no doubt' refer the matter on. He also made a similar pledge in respect of the SFO, which would, he assured him, consider any specific allegation of fraud, provided the necessary criteria were satisfied and there was sufficient evidence to 'justify commitment' of its resources (GMB01/C2, 1994).

Edmonds, dissatisfied with Staple's refusal to take the matter further, replied, reinforcing his original claim of widespread fraud. He argued that the profits which had been made from giving people misleading advice to transfer their pensions at substantial losses which fell far short of the requirements of the FSA 1986 seemed fraudulent. More importantly, however, he recommended a specific course of action to the SFO; urging them to invite KPMG to supply their files 'so that the individual cases which emerged from their survey, could be reviewed to establish whether fraud [had] taken place' (GMB/C3, 1994).

There were several problems with Edmonds' referral in galvanising the SFO into action. Some of these were spelt out in Staple's reply. Edmonds was informed, for instance, that 'failure to give good advice' would not in itself 'constitute a criminal fraud' even where the law required it, but that 'in order to avoid raising false expectations', the SFO would require 'clear evidence of dishonesty', before it could commence an investigation. Of equal importance, Staple stressed, was that if there had been fraud Edmonds' complaint referred to 'relatively small losses resulting from the activities of each individual or company responsible' which came within the ambit of the police rather than the SFO. Whilst carefully seeking to impress upon Edmonds that his complaint was not suitable for an SFO investigation, Staple stressed that the matter was not being ignored. He reminded him that SIB had set out a timetable for 'a programme of remedial action' and repeated his confidence in SIB's readiness to refer any evidence of fraud to either the SFO or the appropriate police force (GMB/C4, 1994).

Staple's explanation of the SFO's refusal to formally register the case for vetting failed to convince Edmonds, who again urged Staple to reconsider his approach. His response to Staple's explanation that the case was not appropriate for an SFO investigation, however, still failed to conform to the SFO's criteria. As an answer to Staple's observation that the matters only involved small losses, for instance, Edmonds argued that specific 'losses of £20,000 and £30,000' had been incurred which he believed the public would not regard as small. These sums, nonetheless, still fell short of the SFO's £5 million limit which was in operation at the time. On the matter of evidence of fraud, however, Edmonds arguments seemed more powerful. He claimed that Staple had misunderstood the results of the KPMG study since the 'suspect advice' it had referred to 'clearly [meant] to go beyond merely poor or bad advice.' Furthermore, he added, the SFO's reliance on SIB to refer evidence of fraud to the police 'scarcely [gave] the impression' that the SFO was 'concerned to investigate whether criminality occurred in what ha[d] already been described as 'the biggest rip-off in Britain's financial history'' (GMB01/C5, 1994).

Edmonds' persistence - combined, perhaps, with his creeping disillusion with the SFO's failure to conform to its symbolic role as the lead criminal justice organisation for financial fraud - finally moved Staple to propose a meeting with his vetting officer, John Tate, in which the question of whether the case 'ought to be formally vetted' could be discussed (GMB01/IC1, 1994). Tate, for his part, considered that the matter had not 'reached the stage when it should become a vetting matter' since, other than Edmonds' suspicions, the SFO had 'no evidence of fraud'. He advised Staple that as a 'prerequisite' of registering the case for vetting 'there should be some basis for suspecting fraud'. To this end, he suggested that two pieces of information were crucial: a copy of the KPMG report and, 'in particular', the details of those cases in which 'suspect advice' had been given (GMB01/IC2, 1994). As a consequence, he informed Staple that he had written to Jeremy Orme, head of enforcement at SIB, asking 'as a matter of urgency' for a copy of the report and details of the cases where 'evidence of suspect advice was given'. He warned Staple, however, that whether SIB would supply the SFO with a copy was 'another matter', but he 'suspect[ed] that if there had been anything in the report that suggested fraud then they would have brought it to our attention already' (GMB01/IC2, 1994; GMB01/C6, 1994).

Despite Tate stressing a reply as a matter of urgency, Orme's response was anything but urgent. It took over three weeks and a reminder from Tate before his reply finally arrived at

the SFO (GMB01/C7, 1994; GMB01/C8, 1994). As an aid to the SFO's decision on whether the case should be formally vetted, his letter was ambiguous. On the one hand, he informed Tate that of the 735 cases in KPMG's sample, 273 were classified as 'suspect' or as 'unsatisfactory and suspect' rather than the 37 the SFO had originally thought. This implied that 'suspect advice' was far more systematic than the SFO had at first believed, a pre-condition to suspecting anyone further up the chain of having committed fraud. On the other hand however, he stressed that 'suspect' meant 'questionable' in terms of SIB's regulations and not in terms of the 'requirements of the criminal law'. As such, in SIB's view, the KPMG report had not been 'intended to be relevant to criminal law issues', but rather should be seen 'as classically on the regulatory side of the criminal regulatory interface.' Significantly, however, he failed to include the suspect files with the report, on the basis that SIB did not have 'any material in our possession which we ought usefully give you other than the report itself' (GMB01/C8, 1994).

On receiving the report Tate, who had not at that point read the report, wrote a memo to Staple relaying the contents of Orme's letter. The words 'suspect advice', he wrote, were specifically considered from the 'regulatory point of view and not that of suspected offences'. This was sufficient for Staple to write back to Edmonds, informing him that, although the SFO was now considering the matter, its 'preliminary view' was that the KPMG report did 'not disclose sufficient evidence of any offence involving serious or complex fraud' (GMB01/C9, 1994).

Tate, in the meantime, wrote to Orme, on this occasion having read the KPMG report. He stated that he was 'fully in agreement' with Orme's earlier observation that it had 'not [been] intended to be relevant to criminal law issues', but rather was 'quite clearly directed at regulatory and compliance matters'; adding that there was 'nothing in the report which could give rise to an SFO investigation'. However, despite acknowledging that the report did not provide grounds for an investigation, Tate was, nevertheless, not prepared to allow SIB's resistance to providing information additional to the report rest. He informed Orme that further investigation was necessary. There had, he noted, 'clearly been major problems with some pension transfers' and enquired whether Orme's prior claim not to have any information in its possession, particularly in relation to transfers classified as 'unsatisfactory and suspect', extended to any of the SRO's (FIMBRA, LAUTRO and IMRO) or KPMG (GMB01/C10, 1994).

Thereafter, the correspondence from Orme was solely designed to emphasise the measures SIB was taking to attribute fault among the companies involved in transferred pensions. The only additional information that the SFO received seems to have been press releases and statements with supporting material which set out a programme of research for firms designed to uncover the extent of 'mis-selling', the financial loss resulting from non-compliance and the forms of redress that would be undertaken (GMB01/C11, 1994).

Edmonds, meanwhile, continued to write to Staple, bringing to his attention a report published by SIB which estimated that over 1.5 million people had either opted out of, or had been persuaded not to join, their employers pension scheme, a route which SIB recognised could never be good advice (Bacon and Woodrow, 1994). In addition to this, Edmonds noted that a separate research study by Coopers and Lybrand had estimated that a further 2.4 million people had been wrongly advised to opt out of SERPS into personal pensions. The scale of 'mis-selling', he deduced, 'surely indicate[d] that something more sinister than casual 'mis-selling' ha[d] been going on' (GMB01/C12, 1994).

Staple, for his part, was growing anxious that the SFO should be seen to be responding to Edmonds' 'increasing concern...that criminal activity may have taken place' and so called a meeting to discuss the Office's 'next step' (GMB01/IC3, 1994). The strategy eventually decided upon was to provide Edmonds with a comprehensive written account explaining the SFO's position and to extend an invitation for a meeting with Staple (GMB01/IC4, 1994; GMB01/C13, 1994). Staple's letter began by repeating what Edmonds had been told the outset. There was, he wrote, 'nothing in the report which appears relevant to criminal law issues, and nothing in it which could give rise to an SFO investigation'. On the contrary, the report was 'clearly directed at regulatory and compliance issues'. To emphasise the point, Staple brought the provisions of section 1(3) of the Criminal Justice Act 1987 to Edmonds' attention. The effect of this, he informed him, was that the SFO could only 'investigate a suspected offence' if it appeared 'on reasonable grounds to involve serious or complex fraud'. SIB and the relevant SRO's, he added, were 'well aware' of the need to be 'alert to the existence of fraud' and also of 'the need to refer fraud' to the SFO, but still no referral had been received. Even if there was evidence of fraud, he continued, at least one of the SFO's criteria of acceptance (factual or legal complexity, public interest or concern, or whether the value of the alleged fraud exceeds a monetary limit of £5 million) would have to

be satisfied if the SFO's decision was not to be 'open to challenge in the courts.' Although the cumulative sums involved were substantial, each life assurance company and financial intermediary would have to be considered individually. If a investigation were to approach the monetary limit, as such, Staple would need to have 'reasonable grounds to suspect...that a pensions provider or financial intermediary had adopted a deliberately dishonest policy of inducing clients to transfer to a less beneficial personal pension provided by them from some more beneficial scheme.' Staple stressed that he had 'no such reasonable grounds.'

Staple's final comment was, however, by far the most significant. He informed Edmonds that it was 'generally recognised that there ha[d] to be a dividing line between regulatory action and criminal proceedings' and that where regulatory action 'results in losers being recompensed at the expense of the organisation causing the loss' this was usually the most appropriate way of disposing of a case' (GMB01/C13, 1994).

In the event, Staple's and Edmonds finally met and their correspondence ceased.

The Age of Regulation

The 'mis-selling' of pensions affair illustrates a number of general issues relating to the SFO's position within the apparatus of commercial fraud control, as well as giving an insight into how the guidelines on the division between regulation and criminal justice intervention have been used in the context of a specific case. The following discussion begins with a brief examination of the case's significance to the SFO's position within the social complex of financial regulation. And concludes with a brief examination of the application of the guidelines.

The genius of the SFO's creation resides in its incompleteness. Although the failure to grant the SFO powers of detection was not designed for any purpose other than to limit the cost and length of time in creating the organisation, it nevertheless had the effect of leaving the SFO ideally situated to serve rather than control the financial service industry. Since, in leaving the responsibility of detection to SIB, its SRO's and the RIE's,[31] it meant that these bodies, not the SFO, have ultimately been left to determine which cases are prosecuted, which are subjected to a mere regulatory response and which are ignored.

The SFO's position within the social complex of financial regulation imposes a structural limitation on its capacity to mobilise the criminal law. The fact that cases of suspected financial fraud are generally referred to it direct from the various bodies and institutions recognised under the FSA 1986 serves to place the principal emphasis of criminal construction on these referral bodies. Their assessment of the event or series of events in question, their approach to the matter in hand, becomes vital to the SFO's decision to accept a case for investigation; a decision which formally falls to the Director who, acting on the advice of the vetting officer, must decide whether there is reasonable grounds for suspecting that a fraud has been committed.[32] The question, however, remains. To what extent and under what circumstances are these institutions designed and prepared to construct criminal suspicion and refer cases on to the SFO?

Criminal prosecution can and does serve the interests of the financial services industry and the FSA regulatory apparatus. These interests are complex and contingent. They vary from reinforcing the authority of the SRO and its regulations (the Levitt case), to supplanting inadequate regulation (Levi, 1993: 75), to creating a symbolic break with the past (the Gooda Walker case). An SRO's interest in realising criminal justice intervention in a specific case, however, may not remain constant. The value of a prosecution to an SRO can and does dissipate, changing from a priority to an irrelevant diversion (as the following discussion on the De Spretter Futures case demonstrates).

What is also true is that criminal prosecution is not always functional to either the economic interests of the financial service industry or the organisational interests of its regulatory apparatus. One reason for this may be the dual effect of criminal prosecutions. On the one hand the institution of criminal proceedings can be used to demonstrate the state's and regulatory apparatus's determination to punish commercial fraud. This can serve to neutralise allegations of tolerance or, worse still, complicity (see the Guinness case). On the other hand, however, the public nature of the criminal trial - the fact that it produces a detailed narrative of the circumstances of a particular case, the fact that it attracts far greater coverage in the news media than disciplinary proceedings, and also, ironically, the fact that it can produce the criminal label - can have a negative effect. Commercial fraud is a constructed definition; produced on the application of the criminal label. This is true of all criminal offences (Becker, 1963), but the formal application of the criminal label is

especially significant to public registration of commercial fraud. The reason for this is ultimately to be found in the complexity of the circumstances surrounding and involved in commercial fraud (see Shapiro, 1990) which means that the principal issue throughout a criminal investigation and trial tends to concern whether or not a crime took place just as much as it does the identity of the person who committed it (see the Blue Arrow and Therm-A-Stor cases for example). Thus, criminal investigations and trials produce as much as expose commercial fraud; creating crime not only where none existed before, but also where none was suspected before (or at least where it was ambiguous). Moreover, since criminal justice intervention operates according to a different set of imperatives (based on the establishment of legal guilt) in which the SRO no longer has control, the evidence which surfaces at trial can serve to undermine the integrity, probity and competence of the industry and its regulation (see the discussion on the Gooda Walker and Biddencare cases). It can for instance reveal inadequate regulation (see the Maxwell case), or even a traditional acceptance of practices which have become the subject of criminal proceedings (Levi, 1993: 75; see the Guinness case). None of these outcomes serves the aims or interest of either the financial service industry or its regulatory apparatus. To summarise the mobilisation of the SFO is not an end in itself, nor a uniform priority, but rather is but one option to be taken on the basis of its temporal significance to a specific set of circumstances.

It is important to stress, however, that the SIB and its SRO's do not possess a monopoly over the communication and realisation of either their interests or the interests of the industry they regulate. As we saw in both the Biddencare and Gooda Walker cases, the SFO itself shows an acute awareness of the potential effects of criminal justice intervention both on the relevant sector of the financial service industry and its regulation. These effects are taken into consideration by the SFO in determining how it should proceed. This is simply an extension of one of the SFO's stated aims - to produce an 'economic benefit' by generating 'greater confidence in the City of London' (Wood, 1989: 177). The SFO, in other words, is not merely concerned with the prosecution of commercial fraud, but also with the profitability of the financial services and industry and the integrity of its regulation.

To return to the 'mis-selling' of pensions affair, a criminal investigation, especially on the scale that Edmonds had suggested, would have served neither the economic interests of the life assurance industry, nor the political interests of either SIB or the SRO's. The incentives to resolve the transfer of pensions controversy through the regulatory system, rather than

the criminal justice process were immense. The investing public had already lost confidence in the persons industry as a result of SIB's response to the 'mis-selling' of pensions scandal which in terms of monies paid out in compensation to investors alone has been estimated to have cost in excess of £4 billion (Merrell, 1997). The cause of the controversy had been a combination of Government encouragement, ineffective regulation and business transacted for the sole purpose of generating profit without regard to the demands of 'best practice' required by the FSA 1986. The entry of criminal justice into the equation would have only served to compound the public's loss of confidence in the industry and its regulation by translating the controversy into the more readily understandable currency of criminal dishonesty.

It is questionable whether SIB, or its SRO's for that matter, exercised a deliberate policy of withholding information from the SFO which might precipitate an investigation. What is certain, however, it that SIB's interests conflicted with criminal prosecution which, in all probability, served to compound its general reluctance to mobilise the SFO (Levi, 1995: 191).[33] More significantly, SIB's response to the 'mis-selling' of pensions affair was simply to design the detection of criminal offences out of the investigation process.

Edmonds entry into the affair illustrates the problems involved in disrupting the closed communication between regulators and the SFO. The fact that there was no 'clear evidence of dishonesty' was a misnomer. Not only does reasonable suspicion have no clear definition, it is also a construct (Dixon, *et al*, 1989; McConville, *et al*, 1991). Suspicion can just as readily be formed first so that the investigation process becomes an exercise in substantiating that suspicion. Although referrals must be defined in terms of alleged criminal offences the evidence upon which that definition is based plays only one part in the SFO's decision to accept a case for investigation. There was no clear evidence of dishonesty in the Gooda Walker although this did not prevent the SFO from accepting it. Furthermore, when the Gooda Walker case was referred to the SFO, the SFO was not in a position to conclude that the information in its possession supported a reasonable suspicion of serious fraud. This did not prevent it from carrying out further enquiries to substantiate the allegations that had been made in the referral. The important difference is that in the Gooda Walker case the referral had the support (at the beginning at least) of the relevant regulatory authority. The following discussion of the De Spretter Futures case further illustrates the ambiguity of reasonable grounds to suspect. It also illustrates the SFO's readiness, in the

earlier years of its operation at least, to accept cases on the basis of a suspicion, but without a clear indication of the commission of any criminal offences, and then to construct its case to prove the commission of criminal offences.

What seems of equal, if not more, importance than the available evidence in the process of deciding whether reasonable grounds to suspect a serious fraud exists is the identify of the referral body and their interpretation of the information upon which the referral is based. If the referral body alleges fraud the SFO will at least investigate further to explore the validity of the claim. It is, in other words, the construction of a recognised referral body which makes a referral capable of supporting reasonable grounds of suspicion.

Of equal significance was SIB's the application of the guidelines setting out the division between criminal prosecution and regulation. The guidelines imply discussion and negotiation, but the SFO was prevented from inspecting the information upon which the KPMG inquiry was based and was therefore in no position to make an informed decision. SIB, for its part, simply used the guidelines as a means of justifying its continued control over the affair.

DE SPRETTER FUTURES

Introduction

The De Spretter Futures case provides an instructive comparison to the 'mis-selling' of pensions referral. Although it offers a perfect example of the importance of the referral body's original construction of the case in the SFO's decision to accept a case for investigation, it shows that (during the SFO's early history at least) cases were accepted for investigation even though there was little evidence of any substantive criminal offences. The purpose of the investigation it seems was not simply to construct a case for prosecution but to discover if any criminal offences had been committed.

The case concerned the operation of De Spretter Futures and Options Ltd. (De Spretters); a small 'introducing broker', employing only six investment staff[34] with a client base of just seventy three, which was originally incorporated on 10th June 1986 in the name of Partfinal Ltd. (DES01/R1: 1988).[35] The SFO had accepted the case for investigation on 13th April

1989 after a referral from the DTI. An investigation lasting several months followed which culminated in two defendants being charged with fraudulent trading - Dean De Spretter, the managing director of the company (2nd October 1990), and Phillip Carter, a one time member of its investment staff (28th September 1990). The case was never brought to trial. On 28th January 1991, the day the case was due to be committed to the Crown Court and exactly four months after Carter had been charged, the SFO took the decision to take no further action.

This sequence of events was unusual. Even during the first few years of its operation the SFO rarely accepted a case for investigation, yet alone commenced proceedings against suspects under investigation, without at least then proceeding to issue a notice of transfer or present its case before the examining magistrates for the purpose of committing the case[36] to the Crown Court. The case, in short, was unusual for the simple reason that the SFO discontinued the case shortly after it had commenced proceedings against De Spretter and Carter. The atypical nature of the case may at first seem to reduce its value as a means of excavating the evidential basis upon which the SFO generally accepts cases for investigation. To put it another way, the evidential basis upon which the case was accepted for investigation may have been the principal reason the case was not brought to trial.

The basis upon which the SFO accepted the case for investigation was important to its decision to terminate. but it was equally a product of the limited resources which had been set aside for the case and the SFO's relationship with the Association of Futures Brokers and Dealers (the SRO with responsibility for regulating De Spretters). Another way of interpreting the termination of the case, in other words, is to see the lack of resources set aside for its investigation and the failure of the AFBD to lend the assistance anticipated at the beginning of the investigation as factors which exposed the fact that the case had been accepted for investigation without any clear evidence that a criminal offence had been committed.

The Operation of De Spretter Futures and Options Limited

Throughout the brief period in which it traded (between the 1st November 1986 and 27th June 1988) De Spretters acted as an introducing broker. It neither directly held client funds nor used them itself to trade in securities, rather it attracted private clients who were then

'introduced' to a company which was able to trade in financial derivatives. For most of its trading history the company it used to this effect was Geldermann Ltd. (Geldermanns), a 'floor member' of LIFFE Exchange. De Spretters would arrange for clients to complete and forward the relevant documentation necessary for Geldermanns to commence trading on their behalf. On receiving the documentation Geldermanns would then open an account in the client's name, allocate the account a number and commence trading on receipt of funds from the client (DES01/SW1: 1990). Thus, although it was Geldermanns rather than De Spretters who held clients' funds and bought and sold derivatives on their behalf, Geldermanns itself did not exercise any control over how client accounts could be traded. On applying to open an account with Geldermanns De Spretter's clients were required to give full power of attorney to De Spretters, granting it a discretion to place orders for futures and options[37] with Geldermanns. The effect of this was that although De Spretters did not handle client funds directly, it effectively had control over them, with Geldermanns trading in derivatives on behalf of clients on De Spretter's instructions.

The investment staff at De Spretters would generally telephone Geldermanns, instructing it to purchase either commodity futures or options. Geldermanns were formally required to have the account number of the clients at the time of order so that the trade could be allocated to a specific client. According to René Rambridge, a former employee of De Spretters, account numbers were frequently not given and orders were regularly made by investment staff, sometimes on Dean De Spretter's instructions, without any knowledge of the account number (DES01/R(W1): 1989).

De Spretter's seventy three clients invested a total of £1,532,832 of which only £277,588 was eventually returned to them. The overall loss suffered by its clients was £1,332,443 or almost 87 *per cent* of the total amount of funds invested (DES01/SW1: 1990). When an order was finally made to wind up the company on petition of one of its creditors on 25th January 1989 (DES01/C2: 1990), just over half a year after it had ceased trading, the chances of any of its clients recouping any of the funds that they had lost were slim. An Assistant Official Receiver from the Official Receivers Office who was working on the liquidation in the High Court, estimated that on the information available there was a deficiency of £194,604 of which £50,000 represented capital lost and £81,507 De Spretter's loan account (DES01/C2: 1989).

The operation of the company had clearly been financially disastrous of its clients. As the Assistant Official Receiver said, 'the scale of the losses demonstrates at least gross incompetence in trading in the futures and options market' (DES01/C2: 1989). The question was whether De Spretters had been operated fraudulently.

The Course of the Investigation

The CIB had instituted two enquiries (2nd September 1988) - one into De Spretters and the other into Geldermanns - under section 105 of the Financial Services Act of 1986. The enquiry into De Spretter's encountered problems almost immediately (DES01/C2: 1989). The major obstruction to reconstructing De Spretter's trading was the general dearth of available documentation, a problem compounded by what the CIB's investigators believed had been a 'massive' destruction of documents towards the end of 1987 (DES01/M1: 1989).

At a meeting between the CIB investigators and the SFO some six months after the completion of the enquiries (on 19th December 1988 and 10th January 1989), the full extent of the problems that this shortage of information had caused the CIB was revealed to the case team at the SFO working on the De Spretter case. Although De Spretters kept a cash book on the premises 'which revealed very little', there was no ledger. There were, however, bank and client account statements and individual client information sheets, but no dealing sheets either at De Spretters or Geldermanns, making it difficult to trace the actual trades. The documentation held at Geldermanns offices was more comprehensive; enabling the CIB's investigators to take copies of all the trading slips relating to De Spretter's clients which at least provided a way of tracing individual trades (DES01/M1: 1989). Although this it seems was sufficient to enable the CIB to identify a number of broad failings within De Spretters and Geldmanns (see below), it was still not enough for the CIB to systematically trace individual trades; a process which was a crucial pre-condition to identifying whether any criminal offences had actually been committed. Nonetheless, the reports written on the completion of the enquires were critical of both companies, and not only suggested that De Spretter's client accounts had been 'churned' to maximise revenue for the company, but also identified irregularities in the way that client accounts in general

had been traded; matters which, after some consideration, eventually moved the DTI to refer the case to the SFO in late March.

The SFO accepted the De Spretters case for investigation solely on the basis of the reports produced by the CIB. These reports continued to be the only information in possession of the team working on the case when it met to consider the case at its first case conference on 22nd May 1989. The minutes of the conference (together with a written analysis of the CIB's reports undertaken by Detective Sergeant Maxted, one of the Metropolitan Police Officers working on the case with some knowledge of derivatives trading) reveal the state of knowledge of the case team at the time and the extent, or rather lack of it, to which the information in its possession provided it with any real sense of what specific criminal offences had been committed. On the question of the case team's general appreciation of the operation of De Spretter's trading, the minutes and Maxted's analysis suggest that it only had a broad understanding of De Spretter's operation of its client accounts, its relationship with Geldermanns, and the key roles played by some of the employees of the two companies. That said, the team were sufficiently apprised of the operation of the company's trading to recognise three potentially productive areas for further inquiry which were likely to produce evidence of specific criminal offences. The first concerned the possibility that De Spretters' had 'churned' clients' accounts to maximise its commission at the expense of the financial interests of its clients. The second concerned the routine delay in allocating trades to specific client account by withholding account numbers from Geldermanns for the possible purpose of manipulating trades. And the third related to the exceptional profits and irregular trading on the Siddiqi account which suggested that it had been used as a 'house account' for the benefit of De Spretters, selected trades being credited to the account once it was clear that they would be profitable (DES01/IC3: 1989). All of the above constituted little more than suspicions based on the available information. None were substantiated, yet alone clearly rationalised as founding the basis of any specific criminal offences. This is clearly illustrated in the section of the minutes recording the discussion in which the case team considered the possible criminal offences which the possible areas of further inquiry might reveal. To this effect, the case team were only in a position to speculate and, even to this effect, the team's efforts were vague and to a large extent, in light of the investigations which were to follow, inaccurate (DES01/CC1: 1989). The relevant section of the minutes reads:

'As far as possible offences are concerned there is a presumption of complicity between De Spretter and West within Geldermanns as far as manipulation of individual client accounts is concerned. It is not at this stage known whether there was any benefit to De Spretter in such arrangements being made and this is one area which will have to be investigated further. It may also be that the operation by De Spretter of the clients' discretionary accounts could in itself be unlawful despite the nature of the accounts being discretionary. If the accounts were operated in such a way as to make loss of funds by the clients almost certain and if the accounts were churned by De Spretter then substantive charges of deception against De Spretter then substantive charges of deception against De Spretter may also have to be considered' (DES01/CC1: 1989).

This rather vague identification of criminality was echoed in the ambiguous conclusion to Maxted's analysis upon which, it seems, the above speculations were at least in part based.

'When considering the evidence portrayed in the Report, the only irregularities pertinent to criminal offences against De Spretter centre on the trading slips compiled by the trades upon information received. The fact that account numbers have been reported late and added after execution together with tickets being marked up 'As of', one is lead to consider offences of false accounting contrary to section 17(1) of the Theft Act 1968, which could apply equally to De Spretter and the members of the trading desk.'

'However, in considering false accounting one has to look to the loss and gain situation. Certainly the loss is matched to the client buy the gain would ultimately be to Geldermanns, who are holding client funds and not to De Spretter. Therefore one could ask why De Spretter would delay the account numbers. It is feasible that De Spretter was making enough money from his commission kick back.' (DES01/IC3: 1989)

It was therefore necessary for a substantial amount of further investigation to be undertaken not only to substantiate the three hypotheses but also, more importantly, to establish whether any of the areas identified might produce evidence of specific criminal offences.

'Certainly at this stage it was agreed that further investigation was necessary and that the resources currently allocated to the team were sufficient for such investigation to proceed.' (DES01/CC1: 1989)

The case, it seems, was accepted for investigation not so much to prove that criminal offences had been committed, although this was the ultimate aim of the investigation, but to unearth evidence of possible criminal offences. The reasons why the SFO accepted the case are not immediately to be found in the criminal law but elsewhere with the criminal law ultimately being used as a resource to pursue other objectives (see Levi, 1993).

The task now was to fill in the substantial gaps in their knowledge and to find evidence which justified substantive criminal offences:

> '...the most important immediate steps were to ascertain what documentation was still in existence and then to secure it.' (DES01/CC1, 1989)

Maxted's theory was later dismissed by the CIB at a meeting with the SFO. And it was not until the 5th case conference on 29th August 1989 that the SFO finally considered that its previous enquiries had produced enough information for an investigation to proceed. The minutes of the conference record:

> 'It was evident that there was now evidence in the case which justified further investigation. We have evidence of a new company getting into difficulties, and of a large number of clients who complain of the manner in which their account was handled, and the losses which were thereby incurred. With the evidence of Siddiqi, we have evidence that De Spretter himself (and Carter) profited from the manner in which the company traded. What we do not have at the moment is proof that De Spretter manipulated the accounts in such a way as to ensure that the Siddiqi account showed a profit at the expense of the other clients, but there are strong indications from the employees seen already that this is in fact the case' (DES01/CC5: 1989)

At this point the SFO still did not have any evidence that De Spretter was allocating the trades so that one account was prejudiced at the expense of others, nor whether the accounts were generally handled in a dishonest way. As the minutes of the conference recorded:

> 'The next step in this case is to look in detail at the Geldermann documentation as against the De Spretter trading sheets to see if we can prove that De Spretter allocated trades in such a way as to be benefit one account and prejudice others. We must also look for evidence that the accounts were generally handled in a

> dishonest way - there are suggestions that churning was common place, and that will have to be examined.' (DES01/CC5: 1989)

The case was later suspended to allow the AFBD to complete a delayed report into the company's affairs. The delay, according to the SFO, was because the AFBD was no longer prepared to devote its resources to the case - regarding it now as a subordinate priority. The AFBD's sudden retraction of support was later to be cited by the SFO as the major reason why the case was terminated shortly before the defendants were to be committed to the Crown Court (DES01/IC2, 1990). What was more significant however, was that the SFO had had the case under investigation for over four months before it considered that it even had sufficient evidence to justify proceeding with an investigation, let alone charging anyone. This was four months longer than the 'mis-selling' of pensions affair. To explain the differences between the SFO's responses to the cases is highly problematic. It is included here, in part, to show changes in the SFO's operation over time. However, this explanation, although supported by the fact that the SFO took the unusual step of charging the defendants without committing them to trial, only provides part of the answer. Unlike the 'mis-selling' of pensions affair both the AFBD and DTI had originally supported an investigation into De Spretters. Both, significantly, had also constructed the case as criminal. And finally, De Spretters, unlike the life assurance industry was insolvent.

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[1] Moreover, the scale of the SFO's contribution to each of the changes varied. Because the relatively small number of personnel either employed by, contracted to work for or seconded to the SFO greatly restricts the number of cases it can accept for investigation, its contribution to increasing the volume of prosecutions of cases of commercial fraud in general was relatively minor. However, since the SFO only investigates what are considered to be the most serious cases, the position is different in relation to the second and third changes where the SFO's contribution was arguably pivotal (see Chapters II-V).

[2] Although the impression given by the evidence discussed in Chapter II was that these type of cases were rarely subjected to prosecution before the establishment of the Fraud Investigation Group concept or the SFO that is not to say they would not have been investigated by either the police or (as would have been more likely taking into account their basic characteristics) the DTI. On the contrary, although the suggestion in Chapter II was that these type of cases were regularly subjected to some form of formal intervention, for a variety of reasons mentioned already, it was rare for them to be prosecuted and rarer still for them to be disposed of by way of either a conviction (either by way of a plea or as a result of a jury's verdict) or an acquittal by a jury.

[3] To invest in a futures contract it is necessary to have available a margin which is like a deposit and represents a small percentage of the total value of the contract. Thus, a futures contract to buy a tonne of oranges which at current value would represent a total contract value of £20,000 might only require a margin of £2,000. Because movements in the price of the commodity on the financial exchanges affect the value of the total contract value, the effect on a small percentage of that value is greatly magnified. Thus, small investments can produce very significant gains and losses very quickly. If the total value of the commodity in the exchanges varies by more than the amount of the margin, it is possible for the losses to exceed the amount of the margin, and therefore a client may be called upon for more money.

[4] Presumably Levi was reflecting the views of the prosecution.

[5] This count alleged that the defendants were knowingly parties to carrying on DPR to defraud its clients by falsely representing that the company was then engaged in genuine and honest business which gave a good and honest service to clients and employed AE's and SAE's of experience, skill and expertise in the field of futures contracts and traded options, and by charging excessive commissions and making extravagant and misleading claims as to the profits likely to be realised by its clients (DPR01/AI, 1990).

[6] As a former employee of the company (who later went onto work for De Spretter Futures) put it: 'The sales environment was very high pressure. A tape recorder constantly played dealing room noises, and the directors, particularly Page, kept up the pressure on the sales staff. Techniques such as the use of 'terminals' - close x number of clients or get the sack ' by the end of the week' (DES01/R(W1): 1988).

[7] See, for instance, *R v Anthony Bonnar and John Morris*, 1993; particularly the judges comments in dismissing the jury at TAS01/TT, 11/11/93.

[8] See John Baldwin's research on judge ordered and directed acquittals for an analysis demonstrating the Bar's reluctance to recommend against prosecution in conventional criminal cases. He found, for instance, the CPS held 'the whip hand' in the decision to prosecute. On the views of the Bar he observed that the 'prevailing view' was that it was 'not part of the duties of counsel to intervene in [the decision to prosecute] other than in exceptional circumstances' and that 'the view commonly taken by members of the Bar was that it was too late to terminate a prosecution by the time the Brief reached them' (Baldwin, 1997: 553-554).

[9] Compare, however, the comments which have been expressed concerning the role of Counsel in *R v County Natwest and others* (1992) (Levi, 1993: 77-79).

[10] Note that this tends to contrast with Levi's observation that, 'the pressure to criminalise - to extend the outer boundaries of the criminal law in action rather than have the law exist solely on the statute books - was and is strongly felt by some independent prosecution counsel as well as by some internal staff' (Levi, 1993: 148).

[11] There were other advantages to investing in Lloyd's such as tax breaks and the ability to earn interest independently on the money invested in Lloyd's, to use the money, in a sense, twice over.

[12] This was later reduced to £2.32 billion as a result of 'double counting'. This occurs when names who have made losses make claims of against 'stop-loss' policies (which provide cover for losses over pre-set limits), 'errors and omissions' policies (which give cover if agents are successfully sued for negligence), or 'estate protection policies' (which cover the losses of decease names) (Lapper, 1994c).

[13] An excess of loss policy is designed to provide protection in the event of a disaster which causes losses above an agreed limit. The large sums involved invariably requires the risk to be reinsured and then reinsured again. As the size of excess of loss policies underwritten at Lloyd's grew, the volume of reinsurance began to grow with it and became known as the London Excess of Loss Market or LMX. Because the market was concentrated within a few specialist syndicates the result was that even though policies were repeatedly reinsured the risk was not sufficiently spread, but rather circulated within a merry-go-round of syndicates.

[14] Such as the hurricane in the UK in 1987, the Piper Alpha explosion the following year, the Exxon Valdez oil spillage in 1989, together with Hurricane Hugo, the San Francisco earth-quake, the devastating explosion at the Pasadena refinery of Phillips Petroleum and the storms in Colorado and Europe.

[15] The chair of the Securities and Investment Board, a director of the Bank of England and one of the eight nominated members of the Ruling Council.

[16] Three thousand one hundred of the names on the syndicates that Gooda Walker managed (who had suffered losses of over £1 billion) formed an action group to sue three underwriters, including Derek Walker, and seventy one agents for more than £600 million, alleging, amongst other things, negligent underwriting (Springett, 1994).

[17] Count 14, which involved the falsification of company documents, had been severed from the indictment before the defendants had been arraigned on it.

[18] Price later resigned from his position on 1 July 1990, four months before Levitt, Reed and McNamara who resigned on 29 November 1990.

[19] It is important to note that the major charge of fraudulent trading encompassed the period from 1st April 1989 and 8th December 1990, whereas the second to fifth counts involved events that had occurred before 1st April 1989.

[20] One of the payments was authorised by Levitt and two by Reed, whilst the prosecution were unable to show whether the remaining two had been authorised by either Levitt, Reed or Price.

[21] Although it did brief journalists on an unattributable basis that it knew of the outcome before Levitt had finally agreed to the bargain (see, for example, Mason and Rice, 1993).

[22] Joel Joffe, former deputy chair of the life insurer Allied Dunbar, for instance, said that the sentence would 'do great harm to the regulatory system.' A spokesperson for FIMBRA commented: 'I can only re-emphasis that we're disappointed that the tough action by the regulators was not mirrored by the sentence' (Cohen and Smith, 1993).

[23] The distinction between an opt-out and pension transfer has different meanings according to the context. A report produced by Bacon and Woodrow classified a pension opt-out as taking place when an employee left an occupational pension scheme to take out a personal pension when he or she could have remained in active membership. This was contrasted with a transfer which took place when the only money paid into the personal pension policy was a transfer sum from the occupational scheme (Bacon and Woodrow, 1994). Unless otherwise stated, the term transfer is used in the text to describe both.

[24] This is the scheme from which the transferred benefits arise and, as such, is the scheme from which the transfer is made.

[25] This guidance covered the following general issues: consideration of the ceding scheme; requirements to provide the client with sufficient information and to ensure that he or she understands what rights and benefits are being given up and the implications of transferring; and the options available to the transferee (KMPG, 1993: 7).

[26] SIB later insisted that the standard used for the KPMG study was, or at least should have been, in force from the first sale of a pension transfer in 1988 (Smith, 1994a).

[27] An unsatisfactory file was defined as one which lacked evidence of sufficient 'know your customer formation', including ceding scheme information, or of compliance with other conduct of business requirements (KPMG, 1993: 12).

[28] A suspect file was defined as one contained material or evidence that seemed either suspicious or misleading: such as evidence of an apparently perverse recommendation; positive evidence of 'mis-selling'; evidence that emotive issues had been played upon; or a comparison that did not match the profile of the ceding scheme benefits without evidence of explanation (KMPG, 1993: 13).

[29] This was especially acute for independent firms who in some cases had seen premiums for personal indemnity insurance rise between 300 and 400 *per cent* (Cohen, 1994a).

[30] SIB denied the claim, insisting that the KPMG had selected firms at random from a list including every firm that had carried out pension transfer business (Cohen, 1994a).

[31] Intervention from the Bank of England or the DTI excepted.

[32] Section 1(3) of the Criminal Justice Act 1987.

[33] Levi gives an account of one senior enforcement official's view on criminal prosecution who stated: 'The purpose of SIB is...not to put people in prison' (Levi, 1995: 191).

[34] This was at the time of its application for AFBD membership in February 1988 and included Dean De Spretter the company's managing director. When AFBD's Membership Committee made its recommendation to the AFBD Council that De Spretters application be rejected in June later that year only De Spretter and one other member of the investment staff remained.

[35] The company changed its name to De Spretter Futures and Options Ltd. on 18 August 1986 by way of a special resolution (DES01/R1: 1988).

[36] That is the case against at least one of the suspects or defendants under investigation.

[37] Towards the end of De Spretter's trading life, Geldermann dealt almost exclusively in traded options on the US markets (AFBD, 1988).

7

THE SERIOUS FRAUD OFFICE AND THE POLITICS OF THE 1980s AND 1990s

One of the major themes to emerge from the foregoing discussion was how the SFO had evolved under the pressure of its own contradictions. It had its origins in a reform process which had begun in the early 1980s with the formation of *ad hoc* fraud investigation groups. This process owed its existence to structural changes in the financial services industry and the Government's strategy to preserve the City as a leading financial centre. The prevention of fraud was regarded as a central plank in preserving the integrity of London's financial markets during a period of radical transformation. Criminal prosecutions were considered to deter the commission of fraud and were therefore integral to wider initiatives, such as the FSA 1986. Throughout this period, reform to commercial fraud prosecution if not inspired by the City, received the City's full support and its effectiveness was judged on the basis of the City's approval. When the Home Office extolled the benefits of the FIG's success in realising the prosecution of commercial fraud to the Fraud Trials Committee, for instance, it did so in terms of the City's alleged new found confidence in fraud prosecution.

There was, however, no one imperative which had sustained the reforms to commercial fraud prosecution as they evolved, no single pressure to which the others could be reduced. Rather, different pressures had become important to shaping the reform process at different stages of its development. This does not mean that the City's demand for market integrity - which had animated the reform process in its early stages - had ceased to apply by the time the SFO was established. The establishment of the SFO was part of a wider reform process and was therefore dependent on what had gone before it. A new organisation of commercial fraud prosecution had first been proposed by the Fraud Trials Committee. The demand for a more efficient method of securing convictions in cases of City fraud - the inspiration behind the establishment of the Committee - was therefore of immense relevance to understanding

the SFO's creation. As the 1980s unfolded the social inspiration of the process did nevertheless change. What had begun as a relatively discreet response to the problem of securing the integrity of the UK's financial markets, had by the latter part of 1985 assumed a political significance well beyond the technical demand of market discipline.

The creation of the SFO, in other words, was not a simple response to the demands of the City for a more co-ordinated approach to commercial fraud prosecution, but was also a reaction to the specific political circumstances of the 1980s. The politics of the 1980s, especially the debates over the City of London and its apparent immunity from outside control, were particularly significant to the SFO's existence - especially its form as an independent organisation. These debates were themselves informed by changes in the City of London, its success relative to the rest of the economy, and its symbolisation of structural inequality (Hutton, 1995). As Roy Hattersley had said in the House of Commons, 'We have today a Government of the City, for the City, and...by the City' (House of Commons, 1986c: col. 941). The City was widely regarded as a law unto itself, thriving at the expense of society as a whole (Coakley and Harris, 1992). The resistance of fraud in the City to prosecution, and the Government's persistent failure to address the problem, were widely seen as symptomatic of this. Fraud, or rather its capacity to escape criminal censure, had become a metaphor of the City's power.

This presented the Government with something of a dilemma. On the one hand it had promoted the ideal of the rule of law, but it was also ideologically committed to lifting constraints from business. Effective reform to the prosecution of commercial fraud had been conspicuous by its absence in the Government's law-and-order strategy, exposing it to criticism for promoting its *laissez-faire* policy on business (in the context of the continued self-regulation of the City under the FSA 1986) above its demand for discipline under the rule of law. The establishment of a distinctive organisation, such as an independent SFO, was of immense value in neutralising this criticism.

The importance of the SFO in this respect resided not so much in its position as an independent, well-resourced organisation with special powers of investigation. Rather, its importance resided in what these features were designed to signify, that is, the primacy of the state over finance capital and the integrity of the bourgeois ideal of equality before the

law. This with a view to dissolving the political pressures which began to bear on the reform process from the end of 1985 onwards.

While the SFO's creation, form, image and operation can be discussed as discrete issues, it is also important to appreciate their inter-dependence. The SFO's representation in the news media, although a distortion of its real operation, is closely related to its form as an independent organisation, and its subsequent operation against large public companies and established financial institutions. Likewise, the SFO's intervention against certain types of fraud is dependant to a large extent on the news media, since the news media is the major source and expression of 'public concern'. And 'public concern' is listed in the SFO's working manual as a central criteria in the SFO's decision to accept cases for investigation which would otherwise be processed through the relevant regulatory mechanisms. This inter-dependence is nowhere more apparent than in the relationship between the SFO's creation and its subsequent operation.

The examination of the SFO's social origins was a valuable exercise in itself. What motivates the state to create organisations which control and help to define white-collar crime is an important, if sometimes ignored, question. It is of particular value to understanding how the imperatives behind the criminalisation of the working-class and business people differ. The question of the SFO's social origins, however, was also addressed to understand how it functioned when it finally became operational in 1988. Two main forces underpinned the reform process. The first was the City's demand for prosecution to marginalise commercial failure, to preserve the integrity of the market and to punish those who defrauded it. The second related to the specific ideological pressures of the mid 1980s. These forces did not simply disappear once the SFO was created; rather they were absorbed into its working practices, into the ideology of its staff the staff of other government institutions responsible for commercial fraud control and, in this way, were brought to bear on its operation.

The widely held view that the organisations of commercial fraud prosecution were fundamentally ill-equipped to intervene against widespread corruption in the City of London not only served to forge the SFO's identity as an institution but also its early organisational ethos. Even before the SFO formally became operational, Crown Prosecutors within the CPS (who later joined the SFO) and civil servants within the DTI were committed to

demonstrating the Government's commitment to prosecuting commercial fraud. Even if it meant bringing directors of large public companies and established financial institutions before the courts. What was important during this period was that 'seriousness', the prime criteria of acceptance of FIG and then the SFO, was simply large-scale fraud with a City dimension. The political climate of the mid 1980s demanded the prosecution of City related fraud irrespective of its other features. Guinness was a politically expedient prosecution. The fall-out of failed prosecutions - expensive trials, family suffering, or destroyed reputations - was at this time a subordinate consideration. The demand for prosecution prevailed.

The specific ideological pressures of the mid 1980s created a demand for symbolic prosecutions. Guinness and Blue Arrow were exceptional cases. They were unrepresentative of the remainder of the SFO's cases, but both consolidated the image that the SFO had been designed to enshrine - the police force of the City of London. Most of the cases the SFO brought to trial involved either smaller financial firms or small private limited companies which, by falling into insolvency, had caused loss to larger financial institutions. These cases represent the product not of ideological contradiction but of the other main pressure behind the reform process - the City's demand for prosecution.

The great irony is that the same political climate which had given the SFO its distinctive form and shaped its image as a ground-breaking expansionist organisation, in the event, brought about the conditions of its own demise. The political climate of the mid 1980s created the pressure to prosecute Guinness and, to a lesser extent, explains why the Blue Arrow case came to be accepted for investigation. As these cases progressed through the courts, the specific ideological reasons for prosecution gradually disappeared. The City no longer occupied centre stage in British politics. The ideological imperative behind large-scale prosecutions dissipated. In its absence, the consequences of expansionism - the immense cost of long trials - became the rhetoric which allowed decriminalisation to occur.

In contrast to the attention that criminalisation had attracted, the process of decriminalisation was obscured from public view, taking place with the minimum of controversy. The importance of the SFO resides in its very existence. Its capacity to prosecute cases involving large companies with a City dimension was greatly amplified in the news media, dissolving criticism of the Government for its tolerance of City related

fraud. The SFO had signified change - the submission of the City of London if not to the discipline of the law then to the rigours of prosecution. It had altered the perception of the state's relationship to capital. When the SFO failed to secure convictions, the fact that it had marked a radical departure in form (better resourced and equipped with special powers of investigation), meant that the Government escaped criticism. It was the SFO rather than the Government that attracted criticism. The SFO's principal achievement, in other words, was to translate a pressing political problem into a bureaucratic issue.

APPENDIX I

THE DEFINITION OF COMMERCIAL, COMPANY, SERIOUS OR FINANCIAL FRAUD

Although the terms commercial, company, serious or financial fraud have no clear or universally accepted definitions, it is nevertheless useful to consider them as separate, but not exclusive, concepts which are commonly used to describe different types of fraud.

Leonard Leigh once described commercial fraud as 'those manifestations of fraud which involve abuses of the forms, facilities and institutions of commerce' (1982:8). A simpler way of saying much the same thing is to define commercial fraud as fraud committed within a commercial setting. It is generally understood to apply to organisational frauds committed through the commercial form (partnerships and public limited, private limited and private companies) which, with the support of the commercial form concerned, tend to advance its aims and objectives. To this effect, the amount of money involved is irrelevant and it can just as well be committed by an individual advancing the aims of the commercial body with the support of the organisation, as it can a number of individuals co-operating to the same effect. Where an organisational fraud is committed by a lone individual the necessity of organisational support implies that the individual must be the chief executive officer of the commercial form involved. In the prosecution against Peter Clowes, Peter Naylor, Guy von Crammer and Christopher Newman (*R v Peter Clowes and others,* 1992) which concerned the operation and eventual collapse of the Barlow Clowes series of companies and partnerships, the prosecution argued that the defendants had conspired to defraud the clients of Barlow Clowes, and as such were working in conjunction with one another. The jury, however, found no such collusion and came to the decision that Peter Clowes, the chief executive of Barlow Clowes - who, the prosecution alleged, had orchestrated the fraud - was operating alone (Peter Naylor was also convicted, but in relation to an isolated act and not the principal conspiracy). Thus, on the basis of the jury's decision, the Barlow Clowes case constituted a commercial fraud that had been committed by a lone individual with the support of the organisation to further the aims of that organisation. Commercial fraud, however, does not necessarily need to be organisational in form, it can equally be a fraud committed by a lone individual or a group of individuals acting in concert with each other (independently of any commercial organisation) against a commercial organisation.

Commercial fraud, as it is defined above encompasses the concept of company fraud. This term denotes all frauds committed through the corporate form (thus, strictly speaking, it excludes partnerships), but unlike the concept of commercial fraud, it only applies to organisational frauds. It does not, in short, extend to individuals who, acting in an individual capacity as opposed to acting as agents of a company, commit frauds through or against companies.

Financial frauds, on the other, do not necessarily involve an organisational element, although the term does tend to invoke the image of an organisation. Its primary distinguishing feature, in the context of this discussion, is the circumstances in which the fraud is committed, namely the primary and secondary financial markets and the institutional saving markets.

Serious fraud (that is those cases of fraud accepted for investigation by the SFO) is neither distinguished by the form of the fraud, nor by the circumstances in which it takes place but by its political and financial significance. On the basis of the cases accepted by the SFO

(which does not have a monopoly on investigation and prosecuting serious fraud - see Levi, 1993), serious fraud tends in general to be organisational.

THE DEFINITION OF COMMERCIAL FRAUD COMMITTED THROUGH OR BY AN 'OTHERWISE' LEGITIMATE COMPANY

The above term is used as a convenient way of loosely denoting those organisational frauds committed by the senior executive officers of a company which has (or has had) some legitimate commercial object. That is to say the function of the company through which the fraud is committed is not purely to serve as a vehicle for fraud. The term is necessarily vague to capture the distinction made between different types of fraud in the Jardine Working Party's report. Furthermore, the distinction between an 'otherwise' legitimate company and an illegitimate company is a matter of degree.

THE DEFINITION OF CITY FRAUD AND CITY CRIME

The term 'City fraud' and 'City crime' is, in addition to the cases cited in the main text, also used to describe cases of fraud committed against financial institutions located in the City of London. An example of this is the Hill Samuel case, which concerned a number individuals, who conspired to defraud the merchant bank Hill Samuel by using forged payment cable forms to authorise the transfer of funds from the bank (Wilkinson, 1990). During the period under discussion, these type of cases were only briefly reported in the news media and, therefore, have had a marginal impact on the news media's representation of the SFO.

APPENDIX II

TABLE 1

THE COMPLEMENT OF THE MCPCFD FOR THE YEARS 1979-1986

Year	No. of Metropolitan Police Officers attached to the MCPCFD	No. of City of London Police Officers attached to the MCPCFD	Total Complement of the MCPCFD
1979	163	46	209
1980	163	46	209
1981	163	46	209
1982	153	46	199
1983	144	46	190
1984	147	53	200
1985	147	53	200
1986	147	53	200

Note: Levi quotes the figure of two hundred and eleven for the year 1982 in his book *Regulating Fraud* (Levi, 1987: 138).

TABLE 2

THE NUMBER OF SECTION 165 INVESTIGATIONS UNDERTAKEN BETWEEN 1967-1978

Year	Appointment of Inspectors under Sections 165(a) and (b) of the Companies Act 1948
1967	18
1968	15
1969	26
1970	15
1971	24
1972	6
1973	9
1974	25
1975	16
1976	10
1977	14
1978	8
total	186

The Department of Trade's Annual Report only records the combined number of investigations under section 165(a) and (b) and, even then, it only records them separately from section 109 inquiries for the years 1972 to 1978. Between these years there were a total of 88 investigations under 165, an average of just over twelve *per annum* (Department of Trade, 1973: 21; 1974: 20; 1975: 14; 1976: 16; 1977: 16; 1978: 16; 1979: 16). In *Company Law and Capitalism*. Tom Hadden, however, combines the data given in the Department's Annual Report with information acquired from a Parliamentary Question which records the individual number of investigations under section 165(a) and (b) and the years 1967 to 1971 (Hadden, 1977: 353). For the sake of consistency, I have simply used the combined number of section 165 investigations throughout the period from 1967 to 1978, even though section 109 investigations were irrelevant to the use of investigations under section 165(a). It is unlikely that this would unduly distort the mean figure used to calculate the number of section 165 investigations that began with a section 109 inquiry in the main text. The reason for this is that, on the basis of the information available, there was rarely more than one investigation under section 165(a) every other year. During the period 1967 to 1978 the Department of Trade undertook a total of one hundred and eighty six investigations under section 165(a) and (b); an average *per annum* of just over fifteen.

TABLE 3

THE NUMBER OF SECTION 109 INQUIRIES UNDERTAKEN BETWEEN 1967-1978

Year	Number of Inquiries initiated under Section 109 of the Companies Act 1967
1967	27
1968	48
1969	62
1970	61
1971	103
1972	109
1973	81
1974	130
1975	150
1976	130
1977	89
1978	69
total	1059

The Department of Trade's Annual Report only records the number of inquiries under section 109 separately from section 165 investigations for the years 1972 to 1978 (Department of Trade, 1973: 21; 1974: 20; 1975: 14; 1976: 16; 1977: 16; 1978: 16; 1979: 16). Hadden's *Company Law and Capitalism*, however, had data acquired from a Parliamentary Question for the years 1967 to 1971, which records the individual number of investigations under section 109 (Hadden, 1977: 353).

TABLE 4

THE TYPE OF CASES PROSECUTED BY THE SFO BETWEEN APRIL 6th 1988 AND APRIL 4th 1995

Type of Cases involving Organisational Fraud	Number
Organisational fraud (where at least one of the defendant is chief executive officer)	68
'Organisational fraud' (including those cases where one of the defendants was not the chief executive officer)	75
Private limited companies (where at least one of the defendants is chief executive officer)	53
Private limited companies (including those cases where one of the defendants was not the chief executive officer)	56
Private limited companies (where one defendants or a combination of defendants has a controlling stake)	50
Public limited companies (where at least one of the defendants is the chief executive officer, but excluding those cases committed through a private limited company which is a wholly owned subsidiary of a public limited company)	11
Public limited companies (where at least one of the defendants is the chief executive officer and including those cases committed through a private limited company which is a wholly owned subsidiary of a public limited company)	14
Public limited companies (including those cases where one of the defendants was not the chief executive officer and also including those cases committed through a private limited company which is a wholly owned subsidiary of a public limited company)	15
Public limited companies (where at least one of the defendants is the chief executive officer, but excluding those cases committed through a financial service company either based inside or outside the Central London and those cases committed through a private limited company which is a wholly owned subsidiary of a public limited company)	8
Public limited companies (where at least one of the defendants is the chief executive officer and including those cases committed through a private limited company which is a wholly owned subsidiary of a public limited company but excluding those cases committed through a financial service company either based inside or outside Central London)	9
Public limited companies (where none of the defendants is the chief executive officer)	1
Financial service companies based in the Central London (where one of the defendants was the chief executive officer)	15
Financial service companies in the UK	33

TABLE 5(a)

ORGANISATIONAL FRAUDS PROSECUTED BY THE SFO BETWEEN APRIL 6th 1988 AND APRIL 4th 1995 COMMITTED THROUGH PUBLIC LIMITED COMPANIES

Case (see below)	Simple Public Limited Company	Financial Service Company	Wholly owned Subsidiary	Chief Executive Officer
POL01	1			1
FAR01	1			1
LEV01		1		1
BPL01	1			1
ESV01	1			1
BW02	1			1
BC01		1	1	1
CNW01		1	1	1
BLA01		1		1
EAG01	1			1
BAF01		1		1
GU01	1			1
MAR01			1	1
FER01	N/A	N/A (1)	N/A (1)	N/A
ELP01	1			1
TOTAL	8	5	4	14

POL01: *R v Asil Nadir and John Turner* (1993) (Polly Peck PLC);
FAR01: *R v Gerald Smith* (1993) (Farr PLC);
LEV01: *R v Roger Levitt and others* (1993) (The Levitt Group PLC);
BPL01: *R v Nicholas Thomas and others* (1994) (Blackspur Leasing PLC); ESV01: *R v Robert Knight, Robert Colman and Moshe Hochenberg others* (1994) (Extra Special Vehicles PLC);
BW02: *R v George Walker and others* (1994) (Brent Walker PLC);
BC01: *R v Peter Clowes and others* (1992) (James Ferguson Holdings PLC);
CNW01: *R v County Natwest and others* (1992) (County Natwest Limited);
BLA01: *R v Andrew Kimmins* (1992) (Blade Securities PLC);
EAG01: *R v John Ferriday and others* (1993) (Eagle Trust PLC);
BAF01: *R v Alexander Cole and others* (1993) (The Bestwood PLC):
GU01: *R v Ernest Saunders and others* (1990) (Guinness PLC);
MAR01: *R v William Didcote and others* (1990) (Marconi Company Limited); FER01: *R v Christopher Roberts* (1991) (Scrimgeour Vickers (Asset Management) Limited);
ELP01: *R v Michael Ward and others* (1995) (European Leisure PLC).

TABLE 5(b)

ORGANISATIONAL FRAUDS PROSECUTED BY THE SFO BETWEEN APRIL 6th 1988 AND APRIL 4th 1995 COMMITTED THROUGH PUBLIC LIMITED COMPANIES

Case	Majority Stake (Chief Executive Officer)	Largest Stake (Chief Executive Officer)	Conviction Rate (Chief Executive)	Conviction Rate (all defendants)
POL01		1		0/2[1]
FAR01	1		1	1/1
LEV01	1		1	3/4
BPL01		1		0/4
ESV01		1	1	2/3
BW02		1		1/3
BC01		1	1	2/7
CNW01				0/14
BLA01	1		1	1/1
EAG01		1	1	2/7
BAF01		1	1	3/5
GU01			1	4/8
MAR01				0/7
FER01	N/A	N/A	N/A	N/A
ELP01			1	3/6
TOTAL	3	6	9/14 = 64 %	19/68 = 28%

[1] Although proceedings against Asil Nadir are still outstanding, on the basis of the probability of him returning to the jurisdiction and standing trial I have determined to count him as an unconvicted defendant.

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DPR01/AI, 1990	A copy of the final amended indictment preferred against Marcus Deller, Andrew Page, David Rycott and Ian Rycott.
DPR01/DSS, 1990	A copy of Marshall-Andrew's Q.C.'s (counsel for the defendant, Marcus Deller) skeleton submission for the defendant's submission of no case at the close of the prosecution's case.
DPR01/I, 1995	A copy of a telephone conversation with Nick Richards, a senior law clerk working on the DPR Futures Limited Case Team (20 January 1995), for the purpose of compiling the Historical Record.
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DES01/CC5, 1989 — A copy of the minutes of the fifth case conference of the SFO team working on the De Spretter Futures and Options Ltd. case held at Elm House on 29th August 1989.

DES01/IC1, 1990 — A copy of an internal memorandum from (dated 22nd November 1990), Patricia Howse, the active case controller on the De Spretter Futures and Options Ltd. case, to Barbara Mills stating the SFO's decision to proceed on a limited number of trades involving the Siddiqi account.

DES01/IC2, 1990 — A copy of an internal memorandum from Barbara Mills (dated 26.11.90) to Patricia Howse, the active case controller on the De Spretter Futures and Options Ltd. case, commenting on Howse's earlier memorandum concerning the preparation of the De Spretter case.

DES01/IC3, 1989 — A copy of an analysis (undated but written shortly after the case was accepted for investigation by the SFO) written by Detective Sergeant Maxted relating to two reports compiled by CIB at the conclusion of its enquiries (under sections 105 and 106 of the Financial Services Act 1986) into De Spretter Futures and Options Ltd. and Geldermann Ltd.

DES01/M1, 1989 — A copy of a note of a meeting written by Lorna Harris between Lorna Harris (Case Controller) and Mike Carey (Accountant) of the SFO and Alan Crocombe and Michael Deveson (CIB Investigators) of the DTI held on 7th July 1989 for the purpose of establishing what documentation the DTI might have in connection with the case of De Spretter and Geldermanns and also to find out any background information from the investigators responsible for the section 105 enquiries into the two companies.

DES01/R1, 1988 — A copy of Association of Futures Brokers and Dealers (1988) A report produced by the Association of Futures Brokers and Dealers (dated 15.6.88) on an application for membership of the Association by De Spretter Futures and Options Limited

DES01/R(W1), 1988 — A copy of a statement made by René Rambridge to the AFBD (dated 26/27.5.88) contained in Appendix B to a report produced by the Association of Futures Brokers and Dealers (dated 15.6.88) on an application for membership of the Association by De Spretter Futures and Options Limited

DES01/SW1, 1990 — A copy of Robin Crocombe's, a Senior Examiner in the Companies Investigation Branch of the Department of Trade and Industry, statement of witness (dated 5.12.90) in the case of *R v Dean De Spretter and Phillip Carter* supplied to the Bow Street Magistrates' Court and written in pursuance of section 9 of the Criminal Justice Act 1967, section 102 of the Magistrates Court Act 1980, and regulation 70 of the Magistrates' Court Rules 1981.

DES01/SW2, 1990 — A copy of Joanna Stuart's, a Senior Enforcement Manager of the AFBD, statement of witness (dated 7.12.90) in the case of *R v Dean De Spretter and Phillip Carter* supplied to the Bow Street Magistrates' Court and written in pursuance of section 9 of the Criminal Justice Act 1967, section 102 of the Magistrates Court Act 1980, and regulation 70 of the Magistrates' Court Rules 1981.

DES01/SW3, 1990 — A copy of Mohammed Siddiqi's statement of witness (dated 31.7.90) in the case of *R v Dean De Spretter and Phillip Carter* supplied to the Bow Street Magistrates' Court and written in pursuance of section 9 of the Criminal Justice Act 1967, section 102 of the Magistrates Court Act 1980, and regulation 70 of the Magistrates' Court Rules 1981.

DES01/SW4, 1990 — A copy of Christopher Cook's, a Senior Compliance Manager of the AFBD, statement of witness (dated 4.12.90) in the case of *R v Dean De Spretter and Phillip Carter* supplied to the Bow Street Magistrates' Court and written in pursuance of section 9 of the Criminal Justice Act 1967, section 102 of the Magistrates Court Act 1980, and regulation 70 of the Magistrates' Court Rules 1981.

R v Michael Ward and others (European Leisure PLC)

ELP01/CS1, 1994 — A copy of the case statement served by the SFO in the case of *R v Michael Ward and others.*

The 'Mis-selling' of Pensions Scandal

GMB01/C1, 1994 — A copy of a letter addressed to George Staple from John Edmonds dated 28th February 1994.

GMB01/C2, 1994 — A copy of a letter addressed to John Edmonds from George Staple dated 16th March 1994.

GMB01/C3, 1994 — A copy of a letter addressed to George Staple from John Edmonds dated 28th March 1994.

GMB01/C4, 1994 — A copy of a letter addressed to John Edmonds from George Staple dated 29th April 1994.

GMB01/C5, 1994 — A copy of a letter addressed to George Staple from John Edmonds dated 11th May 1994.

GMB01/C6, 1994 — A copy of a letter addressed to Jeremy Orme, head of enforcement at the SIB, from John Tate, the SFO's vetting officer, dated 20th May 1994.

GMB01/C7, 1994 — A copy of a letter addressed to Jeremy Orme, head of enforcement at the SIB, from John Tate, the SFO's vetting officer, dated 14th June 1994.

GMB01/C8, 1994 — A copy of a letter addressed to John Tate, the SFO's vetting officer, from Jeremy Orme, head of enforcement at the SIB, dated 15th June 1994.

GMB01/C9, 1994 — A copy of a letter addressed to George Staple from John Edmonds dated 18th July 1994.

GMB01/C10, 1994 — A copy of a letter addressed to Jeremy Orme, head of enforcement at the SIB, from John Tate, the SFO's vetting officer, dated 21th September 1994.

GMB01/C11, 1994 — A copy of a letter addressed to John Tate, the SFO's vetting officer, from Jeremy Orme, head of enforcement at the SIB, dated 21st October 1994.

GMB01/C12, 1994 — A copy of a letter addressed to George Staple from John Edmonds dated 31st October 1994.

GMB01/C13, 1994 — A copy of a letter addressed to John Edmonds from George Staple dated 21th November 1994.

GMB01/IC1, 1994 — A copy of a note from George Staple to John Tate dated 18th May 1994.

GMB01/IC2, 1994 — A copy of a note from John Tate to George Staple dated 20th May 1994.

GMB01/IC3, 1994 — A copy of a note from George Staple to John Knox dated 4th November 1994.

GMB01/IC4, 1994 — A copy of a note from John Tate to George Staple dated 15th November 1994.

R v Ernest Saunders and others (Guinness One)

GU01/CC2, 1987 — A note of a conference attended by counsel instructed to prosecute the first Guinness case, members of the DTI and CPS (dated 25th February 1987).

GU01/DTI1, 1986 — A note generated within the DTI reviewing the papers received from SEC (dated 30th December 1986).

GU01/DTI2, 1987 — A note written by Jonathan Rickford recording that the DTI inspectors examining Guinness's take-over of Distillers had informed him of potential criminal offences (dated 13th January 1987).

R v Roger Seelig and Patrick Spens (Guinness Two - T881630)

GU02/TT, 1991/1992 — A copy of the extracts of the trial transcript of *R v Roger Seelig and Patrick Spens* (1992) in the Central Criminal Court sitting at Southwark Crown Court before Mr Justice Henry.

R v David Mayhew and Roger Seelig (Guinness Three)

GU03/C1, 1991 — A copy of a letter addressed to Barbara Mills from Simmons and Simmons and dated 12th April 1991.

GU03/C2, 1991 — A copy of a letter addressed to Simmons and Simmons from Barbara Mills and dated 23rd April 1991.

GU03/C3, 1991 — A copy of a letter addressed to Barbara Mills from Simmons and Simmons and dated 31st May 1991.

GU03/C4, 1991 — A copy of a letter addressed to Barbara Mills from Simmons and Simmons and dated 29th July 1991.

GU03/C5, 1991 — A copy of a letter addressed to Barbara Mills from John Chadwick dated 10th September 1991.

GU03/C6, 1991 — A copy of a letter addressed to Steven Wooler, Legal Secretariat to the Law Officers, from Barbara Mills dated 11th September 1991.

GU03/CC1, 1991 — A copy of Dickinson's note of a conference attended by SFO's counsel for the Mayhew prosecution, Dickinson himself, Detective Chief Superintendent Botwright and Tony Frankson, the senior law clerk working on the case.

GU03/IC1, 1991 — A copy of an internal memorandum from Gordon Dickinson to Barbara Mills dated 26th June 1991.

GU03/IC2, 1991 — A copy of an internal memorandum from Gordon Dickinson to Barbara Mills dated 11th July 1991.

GU03/IC3, 1991 — A copy of an internal memorandum from Gordon Dickinson to Barbara Mills dated 12th August 1991.

GU03/IC4, 1991 — A copy of an internal memorandum from Gordon Dickinson to Barbara Mills dated 20th August 1991.

GU03/IC5, 1991 — A copy of an internal memorandum from Gordon Dickinson to Barbara Mills dated 9th September 1991.

GU03/CS1, 1991 — A copy of the case statement in case of *R v David Mayhew*.

Gooda Walker Limited

GWR01/BN1, 1993 — A briefing note prepared by Antony Cooke of Lloyd's Regulatory Services and Michael Bowmer of Lloyd's Broking Department of Lloyd's Underwriters (dated 18th March 1993).

GWR01/C1, 1993 — A copy of a letter addressed to George Staple from Gooda Walker Run-Off Limited referring the Gooda Walker case to the SFO (dated 14th April 1993).

GWR01/FN, 1994 — A copy of a file note prepared by Tricia Howse and dated 17th March 1994.

GWR01/IC1, 1993 — A copy of a note from George Staple to John Tate, the vetting officer, providing him with the papers which had been enclosed with Gooda Walker Run-Off's referral (dated 15th April 1993).

GWR01/IC3, 1993 — A copy of a recommendation from Tricia Howse to the Director to continue extended vetting of the Gooda Walker case.

GWR01/VN1, 1993 — A copy of a note of a meeting between Richard Hobbs (of the DTI insurance section, responsible for advising ministers on Lloyd's), Gay Burns (of the Companies Investigation Branch of the DTI), Tricia Howse, Mark Ballamy (the investigating lawyer on the case), Mike Dockery, Mike Wade and Gerry Ohlsen of the City of London Police Force.

GWR01/VN2, 1993 — A copy of a note of an extended vetting meeting attended by Tricia Howse, Mark Ballamy (the investigating lawyer on the case), Mike Dockery, Mike Wade and Gerry Ohlsen of the City of London Police Force and Eleanor Philips, a senior law clerk.

GWR01/VN3, 1993 — A copy of a note of a vetting meeting dated 13th July 1993 attended the Director and the Gooda Walker case team.

GWR01/WS1, 1993 — A copy of Christopher Rawson's witness statement witness by Detective Constable Collicott of the City of London Police dated 31st August 1993.

R v Syed Akbar (BCCI - S/0911)

IBC01/TT, 1993 — A copy of the trial transcript of *R v Syed Akbar* (S/0911) in the Central Criminal Court before Mr Justice Scott-Baker dated 27th September 1993.

R v Roger Levitt and others (The Levitt Group PLC - T92/1078)

LEV01/C1, 1993 — A copy letter addressed to David Cocks QC (and copied to George Staple, the Director the SFO, and the Attorney General), leading counsel for the Crown in the case of *R v Roger Levitt and others* (T92/1078), from Jonathan Goldberg, leading counsel for Roger Levitt dated 13th December 1993.

LEV01/CS1, 1993 — The first case statement served by the SFO in the case of *R v Roger Levitt and others* (T92/1078) in pursuant to an order made by Mr Justice Laws under section 9(4)(a) of the Criminal Justice Act 1987.

LEV01/CS2, 1993 — The second case statement served by the SFO in the case of *R v Levitt and others* (T92/1078) in pursuant to an order made by Mr Justice Laws under section 9(4)(a) of the Criminal Justice Act 1987.

LEV01/CT, 1993 — The file on *R v Levitt and others* (T92/1078) stored on the SFO's computer case tracking system.

LEV01/TT, 23/2/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 23rd February 1993.

LEV01/TT. 25/2/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 25th February 1993.

LEV01/TT, 19/5/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 19th May 1993

LEV01/TT, 9/9/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 9th September 1993.

LEV01/TT, 11/11/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 11th November 1993

LEV01/TT, 15/11/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 15th November 1993

LEV01/TT, 16/11/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 16th November 1993

LEV01/TT, 19/11/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 19th November 1993

LEV01/TT, 23/11/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 23rd November 1993

LEV01/TT, 26/11/93 — A copy of the trial transcript of *R v Roger Levitt and others* (T92/1078) in the Southwark Crown Court sitting at the Central Criminal Court before Mr Justice Laws dated 26th November 1993

R v Richard Lines and Thomas Baxter (MTC PLC)

MTM01/PR1, 1994 — A press release dated 16th December 1994 publicising that Richard Lines and Thomas Baxter had been charged at Northallerton police station.

R v Anthony Bonnar and John Morris (Therm-A-Stor Limited - T92/0667)

TAS01/TT, 11/11/93 — A copy of the trial transcript *R v Anthony Bonnar and John Morris* (T92/0667) in the Birmingham Crown Court before His Honour Judge Perrett QC dated 11th November 1993

The Davie Review

DR/WGR1, 1994 — A draft of a paper produced by a Working Group established in pursuance of the Davie Review entitled *Reasons for the Serious Fraud Office Remaining Independent* (dated 19th September 1994).

The Serious Fraud Office

SFO/C1, 1993 — A copy of the a briefing note to Stephen Wooler of the Attorney General's Chambers dated 7th July 1993.

SFO/CS1, 1992 — A copy of the SFO's proposed communication strategy written by Georgina Yates, the Senior Information Officer at the SFO (dated 17th January 1992)

SFO/CS2, 1995 — A copy of the SFO's proposed communications strategy written by James O'Donoghue, the senior information Officer at the SFO (dated 30th January 1995).

SFO/SGFF1, 1994 — A background paper on the Levitt case for the Steering Group on Financial Fraud (dated January 1994).

SFO/IC2, 1992 — Internal Serious Fraud Office memorandum written by Barbara Mills.

SFO/IC3, 1993 — Tape-recording of a paper given by Peter Sime at an Autumn Conference within the SFO in 1993.

SFO/WM1, 1995 — Copy of the Serious Fraud Office Working Manual, Appendix 30, 'Priority between Criminal and Regulatory Machinery', circulated on 1st January 1995.

Inter-Departmental Steering Group on the Serious Fraud Office

SG/R1, 1986 — Minutes of the first meeting of the Inter-Departmental Steering Group on the Serious Fraud Office convened on 19th December 1986.

SG/IC1, 1987 — A draft paper prepared in pursuance of the Inter-Departmental Steering Group on the Serious Fraud Office to be discussed at its second meeting on 22nd September 1987.

SG/IC2, 1987 — A paper prepared by the Commissioner for the City of London Police, Owen Kelly, submitted in pursuance of the work of the Inter-Departmental Steering Group on the Serious Fraud Office (considered at its second meeting on 22nd September 1987).

SG/IC3, 1988 — A draft letter prepared for Sue Street (the secretary of the Steering Group) to send to Michael Saunders (of the CPS) relating to the proposed circulation of a Taking Stock paper (in March 1988) in pursuance of the Inter-Departmental Steering Group on the Serious Fraud Office.