Comment

by Neil Gerrard and Rinita Sarker

The recent attack by Ros Wright, Director of the Serious Fraud Office (SFO) (see *Amicus Curiae*, Issue 12, p. 12) on the tactics adopted by defence lawyers in serious fraud trials is both unjustified and misleading.

Her argument that it is in the 'defence's interests to prolong the trial process for as long as possible ... keeping the issues blurred and unclear' simply does not match with reality.

The SFO's latest annual report acknowledges that 'fraud trials are inevitably lengthy, complex and demanding'. The *Criminal Justice Act* 1987 sets out the legislative framework for the management of serious fraud cases whereby judges have power to control the timetable.

Until a criminal case is transferred to the Crown Court, the prosecution sets the pace of the proceedings. Thereafter, the defence have to appear in court in order, for example, to enter pleas and attend preparatory hearings. Often delays occur because of practical problems such as difficulties in obtaining a court for the length of trial envisaged or because of counsel's availability. Both prosecution and defence lawyers are unable to obtain adjournments of court hearings without good cause. The judge must consider each application on its individual merits.

It is all too easy for the SFO to shirk responsiblity for the delays. Despite attempts at streamlining indictments, the SFO are still putting far too many counts on indictments making trials unnecessarily lengthy and unwieldy. This appears to be done as much out of fear of further public criticism for failing to do a thorough job as a desire to bring the defendant to book.

Trial judges are still not robust enough in using their powers to tackle identification of the key issues directly at preparatory hearings, with the result that proceedings are inevitably drawn out. Preparatory hearings enable judges to streamline the main issues in a fraud case for the better management of the trial and the benefit of the jury.

Notwithstanding their draconian powers of investigation and prosecution, the SFO are blighted by an inadequate and ineffectual use of s. 2 notices and interviews; long drawn-out investigations [an on-going case has been investigated for five years] and their inability to 'see the wood for the trees.'

The most recent example of the SFO's inflexible approach is *Butte Mining*, one of Britain's longest-running fraud actions, which took the SFO five years to investigate. The trial lasted 187 days, with three of the four defendants convicted, at a cost of £5m in legal aid.

One of the major reasons for the delay was the prosecution's insistence on presenting evidence on both the alleged mining fraud, and benefits fraud despite clear indications from the judge that mining fraud evidence need not be adduced. The inflexible stance of the SFO meant that 5½ months of the trial were occupied in hearing evidence which the jury, by their verdicts, clearly rejected.

The prosecution may take years to investigate and prepare a case with the assistance of substantial resources and the benefit of a government budget. It is only right that the defence should be allowed a reasonable time-frame in which to examine and test the prosecution's case. In practice, the defence are allowed an infinitely shorter time in which to do this and yet are still subject to allegations of 'delaying tactics' by the prosecution.

The SFO continue to ignore the impact of art. 6(1) of the *European Convention on Human Rights* at their peril. Under art. 6(1) 'everyone is entitled to a fair and public hearing within a reasonable time'.

Attacking legitimate defence case preparation will no longer be an acceptable excuse for delays where potential breaches of human rights are at stake.

The Commissioner of the City of London Police recently blamed foreign judicial authorities for delay in his officers investigating cases of alleged fraud. Increasingly the prosecuting authorities appear to be blaming everyone but themselves for the inadequacies of the current system of investigating and prosecuting serious fraud.

The pendulum of enforcement appears to be swinging too far in the prosecution's favour with, for example, the slow erosion of the right to silence in serious fraud cases, the relevance of unused material to the defence's case being left to the subjective opinion of the prosecuting authorities, and now the current trend towards the abolition of juries in serious fraud trials.

Jurors in serious fraud trials are accused of lacking the intelligence sufficiently to comprehend serious and complex fraud. The Law ommission is currently reviewing a number of potential reforms to trial by jury in serious fraud cases and the Lord Chief Justice, Lord Bingham has recently advocated the abolition of the jury in such cases as they place 'too much of a burden' on jurors (*Financial Times,* 8 October 1998).

The current cycle of blame for delays has dangerous implications for civil liberties as the hidden agenda clearly appears to be the abolition of a centuries-old right to trial by jury for defendants facing allegations of serious and complex fraud. Unfortunately, the eradication of this right appears based on little or no hard evidence and much speculation.

As Honess, Levi and Charman (*Crim LR* 1998, 763–773) point out in their recent study on juror competence following a simulation of the Maxwell trial:

'it is far from clear to us that the complete abolition of the jury system for complex fraud trials is warranted on the grounds of "cognitive unfitness". Moreover it is unlikely to increase public confidence in the outcomes. Judicial and tribunal options reduce the stake of the ordinary system in criminal justice matters with some screening and more focused help for the jury, non-specialist jurors are sufficiently competent to understand and deal with the information relevant to their verdicts.'

Neil Gerrard and Rinita Sarker

Dibb Lupton Alsop