Kingsley Napley: Serious Fraud, Investigation & Trial

Fourth Edition

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Kingsley Napley Serious Fraud: Investigation & Trial

Fourth edition

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Kingsley Napley
Serious Fraud: Investigation & Trial

Foreword

The last edition of this work was published in 2003 and stated the law as of November 2002. Much has happened since then for those involved in fraud investigations and prosecutions as well as in the overall commercial and financial environment in which we all operate.

There has been much new legislation since 2002 with important new powers such as the provisions about asset forfeiture in the Proceeds of Crime Act 2002 and the provisions about immunity in the Serious Organised Crime and Police Act 2005. There are many more.

The Government's Fraud Review has also been a very significant milestone. For the first time, in my experience, the opportunity was taken to look at fraud on a comprehensive basis and to see how education, prevention and disruption can also play a key role with investigation and prosecution in deterring fraudsters. It was also very important that the private sector was involved in this work because there is a great deal of benefit in sharing experience between the public and private sectors here. A lot has already happened as a result of the Fraud Review and I was particularly pleased with the establishment of the National Fraud Strategic Authority.

Another key development since 2002 has been the much closer alignment of the activities of regulators such as the FSA and OFT and the work of other investigators and prosecutors like the SFO. We all face many issues and challenges and there is much that we can learn from each other.

As we rise to the challenge of looking for radical improvements in the way we investigate and prosecute fraud, there is much that we can learn from experience in other jurisdictions. Links between authorities here and abroad are much closer than they have ever been before. I cannot recall a case I have seen in the SFO that did not involve foreign aspects which we needed to discuss with our counterparts elsewhere and, of course, part of this involves sharing experiences and learning about how we can improve. Working with other jurisdictions is also a key part of the role of professionals who advise those suspected of fraud.

Fraud practitioners have long felt the need for a comprehensive book which incorporates all of these developments since the third edition of this work. I am delighted that the authors of this edition have been prepared to spend time over and above the pressures of a busy professional practice in order to

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produce this work for the benefit of other professionals and all of those interested in fraud. We are indebted to them for their work. This edition will be of very great value to us all.

Richard Alderman
Director, Serious Fraud Office

Preface

Simplicity, clarity and consistency are not words we generally associate with the investigation and prosecution of fraud. Our purpose in writing this book is to provide a clear and comprehensive description of the world of serious fraud. We all know that what is often of crucial importance for defence and prosecution practitioners alike is the intangible gloss that experience gives to law and procedure. Kingsley Napley has been defending clients against allegations of serious fraud for decades and whilst we do not claim to be the only experts in the field, we believe that the first hand practical experience contained in this book will provide a clear route map through the sometimes bewildering landscape of serious fraud.

We are publishing this book at a good time. The torrent of criminal justice legislation which has poured from Westminster is slowing. The huge changes brought about by the Proceeds of Crime Act 2002, the Criminal Justice Act 2003, the Serious Organised Crime and Police Act 2005 and the Criminal Procedure Rules are taking effect. The courts are, at long last, establishing lines of authority in relation to fundamental areas such as confiscation proceedings, the ambit of hearsay and 'bad character' provisions and disclosure. Organisationally, the Serious Fraud Office has come through a period of upheaval and is establishing a structure which, it is envisaged, will carry it forward for some time. The Fraud Prosecution Service is firmly established, headed by one of the previous authors of this work. Criminal enforcement is now also a significant weapon in the armoury of the Financial Services Authority.

A period of what might be relative calm on the legislative front is not, however, likely to be reflected in the broader culture within which serious fraud is investigated, prosecuted and defended. Civil asset recovery is an area with which we all must now be familiar following the conclusion of the *Balfour Beatty* case. Cross border evidence gathering is now a feature of almost all prosecutions of any significant size – particularly in relation to corruption.

Most significant of the cultural changes is that the Serious Fraud Office has made it clear that it expects corporations to 'self-report' misconduct, to conduct internal investigations and deliver their product to prosecutors who will then manage a plea negotiation with the offending corporation. In at least one case likely to be concluded by the summer of 2009, a US style monitor will be appointed to police an offending company following its guilty plea to corruption allegations. It is clear that this country can expect 'plea bargaining light' in the relatively near future, particularly when the provisions of the

Coroners and Justice Bill are enacted and the Sentencing Council is established. A more rigorous approach to sentencing is certain to follow. Where this change leaves those individuals who are the subject of internal investigations and subsequent prosecution as a result of a corporate self-reporting is the subject of much debate.

Lawyers prosecuting and defending in fraud investigations and prosecutions increasingly require skills which go beyond those of the criminal practitioner of even five years ago – an awareness of the commercial imperatives of a corporation involved in an inquiry, an understanding of employment, regulatory and civil law – particularly as it affects asset recovery, a sensitivity to reputational issues – all are part of the skill set of the modern fraud lawyer. In this book we endeavour to distil Kingsley Napley's experience and give all practitioners an insight into the way in which we approach our work in what for us is an endlessly fascinating area of the law.

The book is a collective effort of members of the Kingsley Napley Criminal and Regulatory department. This collective approach emphasises the breadth of the areas covered and, we think, informs our understanding of those areas. As well as the input of the authors, we have been indebted to the assistance of Stephen Parkinson, the head of our department, our senior partner Christopher Murray, managing partner Linda Woolley, Michael Caplan QC, Angus McBride and John Harding.

We have sought to state the law as of 1 February 2009 but have commented on draft legislation, legislation not yet in force and consultations where appropriate.

Stephen Gentle and Louise Hodges

1 March 2009

List of Abbreviations

ACPO	=	Association of Chief Police Officers
ARA	=	Assets Recovery Agency
ATCSA 2001	=	Anti Terrorism Crime and Security Act 2001
CA 1985	=	Companies Act 1985
CA 1989	=	Companies Act 1989
CA 1998	=	Competition Act 1998
CA 2006	=	Companies Act 2006
CAA 1968	=	Criminal Appeal Act 1968
CCA 1981	=	Contempt of Court Act 1981
CDDA 1986	=	Company Directors Disqualification Act 1986
CEMA 1979	=	Customs and Excise Management Act 1979
CHISs	=	Covert Human Intelligence Sources
CIB	=	Companies Investigations Branch
CIB	=	Cartel Investigations Branch
CICA 2003	=	Crime (International Co-operation) Act 2003
CIF	=	Civil Investigation of Fraud
CJA 1987	=	Criminal Justice Act 1987
CJA 1993	=	Criminal Justice Act 1993
CJPA 2001	=	Criminal Justice and Police Act 2001
CJPOA 1994	=	Criminal Justice and Public Order Act 1994
CLA 1977	=	Criminal Law Act 1977
CPAWA 1965	=	Criminal Procedure (Attendance of Witnesses) Act 1965

CPIA 1996	=	Criminal Procedure and Investigations Act 1996
CRCA 2005	=	Commissioners for Revenue and Customs Act 2005
CrPR	=	Criminal Procedure Rules
DOJ	=	Department of Justice
DPP	=	Director of Public Prosecutions
EA 2002	=	the Enterprise Act 2002
ECHR	=	Convention for the Protection of Human Rights and Fundamental Freedoms
EEW	=	European Evidence Warrant
EPE	=	Electronic Presentation of Evidence
FA 2006	=	Fraud Act 2006
FSA	=	Financial Services Authority
FSMA 2000	=	Financial Services and Markets Act 2000
IOSCO	=	International Organisation of Securities Commissions
IPM	=	Informed Price Movements
JVC	=	Joint Vetting Committee
MTIC	=	Missing Trader Intra Community
NCA	=	National Competition Authority
OECD	=	Organisation for Economic Co-operation and Development
OFT	=	Office of Fair Trading
PACE 1984	=	Police and Criminal Evidence Act 1984
PBCPA 1889	=	Public Bodies Corrupt Practices Act 1889
PCA 1916	=	Prevention of Corruption Act 1916
PCA 1906	=	Prevention of Corruption Act 1906
PCC(S)A 2000	=	Powers of Criminal Courts (Sentencing) Act 2000
POCA 2002	=	Proceeds of Crime Act 2002
RCPO	=	Revenue and Customs Prosecution Office
RIPA 2000	=	Regulation of Investigatory Powers Act 2000
SAAC	=	Schengen Agreement Application Convention
SCA 2007	=	Serious Crime Act 2007
SCPO	=	Serious Crime Prevention Orders
SFO	=	Serious Fraud Office
SOCA	=	Serious Organised Crime Agency

SOCPA 2005	=	Serious Organised Crime and Police Act 2005
The Code	=	Code of Conduct for Crown Prosecutors
TMA 1970	=	Taxes Management Act 1970
UKCA	=	UK Central Authority
VATA 1994	=	Value Added Tax Act 1994

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Table of Statutes

Paragraph references printed in **bold** type indicate where the Statute is set out in part or in full.

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